Supreme Court, U.S.
FILED

961878 MAY 27 1997

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

OMNI HOMES, INC.,

Petitioner,

v.

BOARD OF SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA,

Respondent.

ON APPEAL FROM
THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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80 pp

QUESTIONS PRESENTED

1. **Did the Supreme Court of Virginia err in deciding that there can be no compensable regulatory partial taking of private property under the Fifth Amendment to the United States Constitution even if the government's actions are illegal or do not advance a legitimate state interest?**

2. **Did the Supreme Court of Virginia err in refusing to consider the property owner's investment in the property when determining a regulatory partial taking under the Fifth Amendment to the United States Constitution?**

3. **Did the Supreme Court of Virginia err in deciding that the property owner's reasonable investment-backed expectations must be absolute certainties and should include the expectation of illegal and meritless actions by the county government?**

PARTIES BELOW

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STATEMENT OF JURISDICTION

This petition seeks a review of the decision of the Supreme Court of Virginia issued on January 10, 1997 which decision reversed the judgment entered by the Circuit Court of Prince William County, Virginia on December 8, 1995. The Supreme Court subsequently denied Petitioner's Petition For Rehearing on February 28, 1997.

This Court has jurisdiction to review the decision of the Supreme Court of Virginia by way of certiorari under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

U. S. CONSTITUTION, AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This case involves federal law regarding inverse condemnation and the course of conduct of Respondent Board of Supervisors of Prince William County, Virginia (the "County") that culminated in the illegal, unconstitutional, and uncompensated taking of the property of Petitioner Omni Homes, Inc. ("Omni").

On December 2, 1994, Omni filed its Amended Bill Of Complaint For Declaratory Judgment And Injunctive And Other Relief in the Circuit Court for Prince William County, Virginia. The Amended Bill of Complaint contained three counts. Count I sought relief for the taking of Omni's property in violation of the U.S. Constitution and 42 U.S.C. § 1983. Count II sought relief for the denial of due process and equal protection in violation of the U.S. Constitution and 42 U.S.C. § 1983 as well as for the denial of due process in violation of the Virginia Constitution. Count III sought relief for inverse condemnation and damages

under Article I. § 11 of the Virginia Constitution, §§ 8.01-184 et seq. and § 8.01-187 of the Code of Virginia, and, through incorporation by reference of Counts I and II, under the U.S. Constitution. The trial court subsequently dismissed Omni's 42 U.S.C. § 1983 claims for lack of ripeness.

The case was heard on October 16, 17, 18, 23, 24, 25, 26, and 30, 1995, before the Honorable Richard B. Potter, and on November 1, 1995 the trial court announced its decision from the bench. The trial court found that the County's regulatory conduct, consisting of a multitude of sins including (as discussed below) the "Stale Zoning Report", the attempted downzoning of the property, the processing delays, the improper imposition of statutory review requirements, the denial of approvals, the "Sewer In The Green" policy, the discriminatory Chesapeake Bay Preservation Act regulations, the special road bonding requirements, and the purchase of the neighboring property, went too far by denying Omni all economic and viable use of its property by interfering with Omni's reasonable investment-backed expectations and by interfering with Omni's right to use the property as zoned. On December 8, 1995 the trial court entered a final decree awarding Omni judgment against the County in the amount of $850,000.00 (calculated by finding the value was $1,200,000 before the take and $350,000 after the take) for the County's taking and damaging of Omni's property in violation of both the Virginia Constitution and the U.S. Constitution. In reaching its decision the trial court found the facts as set forth below.

Omni is the owner of approximately 72.68 acres in Prince William County, Virginia known as Doves Landing. In January, 1988, Omni filed with the County a preliminary subdivision plat for Doves Landing. Omni's planned development of Doves Landing was

integrally connected to the development of the neighboring property known as Doves Overlook by an entity known as Doves Lane Associates ("DLA") for the road access, water and sewer systems planned for Doves Landing. Both properties are zoned R-10 which allows one unit per 10,000 square feet. The properties had been zoned R-10 for at least 10 years prior to their acquisition with absolutely no development proffers to limit the specific use of the properties. From the very inception of the project and throughout the development process, Omni had the reasonable investment-backed expectation, based on plans and studies, including feasibility studies, appraisals, joint marketing plans, agreements to assemble property, engineering plans, soil reports, road access, sewer and water reviews, and favorable court rulings, that it could develop Doves Landing as an R-10 development in conjunction with Doves Overlook for water, sewer and road access. Based on those completely reasonable and justifiable expectations, Omni invested $1,067,000 in the property.

Despite Omni's and DLA's right to develop the properties in accordance with the R-10 zoning, the County, at the outset, targeted both Omni's and DLA's proposed legal and permissible uses of Doves Landing and Doves Overlook as contrary to the County's desired uses of the properties. However, rather than properly acquire the properties through lawful eminent domain proceedings with payment of just compensation to stop the proposed uses, the County embarked upon an illegal and improper course of conduct in an attempt to stop those proposed uses without paying just compensation.

The properties were targeted in the County's "Stale Zoning Report." The plan of action to illegally stop the developments was set forth in that report and in a memo from the County Attorney. It was systematically

implemented through the County planning and development staff's intentional delay in processing and reviewing Omni's development plans; the imposition of illegal statutory reviews; the involvement of local supervisors in a political campaign; the adoption of the "so-called Sewer in the Green policy to limit the use of public water and sewer [in the area where Doves Landing and Doves Overlook are located];" requiring an approved road bond in the preliminary plan stage rather than at the final plan stage; and the adoption of regulatory requirements under the Virginia Chesapeake Bay Preservation Act that improperly singled out unproffered properties including Doves Overlook and Doves Landing for additional review.

Finally, in October of 1993, after the County still failed to stop the development of the properties at an R-10 density by the improper use of the regulatory subdivision process, in settlement of a separate inverse condemnation lawsuit brought against the County by the owners of the adjoining Doves Overlook (the "DLA lawsuit"), the County entered into a consent decree providing for the purchase of Doves Overlook by the County. At that time, the only economically viable use of Omni's property was as an R-10 development in conjunction with Doves Overlook for water, sewer and road access. The trial court found, as Omni had found, that the project would not work under any other design or zoning category.

The conduct of the County in delaying the approval of Omni's preliminary subdivision plans through the improper use of County ordinances and purchasing the Doves Overlook by virtue of the authority vested in it by state statutes constituted obvious and admitted regulatory conduct.

At the time of the purchase, while the County was completely aware that Doves Landing was tied to Doves Overlook for access, sewer, and water, the County intentionally made no provision for Omni and thereby deprived Omni of the use of its property. A member of the board of supervisors, Supervisor Becker, in fact, testified that depriving Omni of the ability to use its property as planned, at no apparent additional cost to the County, was one of the known and understood benefits to the County of the settlement of the DLA lawsuit. The trial court found that since its purchase of Doves Overlook, the County has taken no action whatsoever to use or develop Doves Overlook in any manner including as an R-10 subdivision. Furthermore, the County has no plans to develop Doves Overlook or to build the planned roads, water and/or sewer systems.

The County's long standing and destructive policy of delay of the approval process and its actions, including the purchase of the adjoining property, denied Omni of all economic and viable use of its property by interfering with Omni's reasonable investment-backed expectations and by interfering with Omni's right to use the property as zoned and therefore constituted a compensable taking and damaging.

The County duly noted its appeal of the trial court's decision and the Supreme Court of Virginia subsequently granted the County's petition for a writ of certiorari. On January 10, 1997, the Supreme Court of Virginia reversed the trial court's judgment and entered final judgment in favor of the County. In doing so the Supreme Court of Virginia acknowledged that there was at least a $100,000 decrease in value of Omni's property resulting from the County's actions but that such a loss constituted a "mere diminution in value." In determining that the loss was a noncompensable "mere diminution in

value," the Supreme Court of Virginia held that, so long as there was any economic use of the property remaining after the County's actions, no matter how slight, the County had no obligation to compensate Omni regardless of Omni's investment in the property or even if the County's actions were illegal or not made to advance any legitimate state interests.

Omni duly filed a notice of its intention to apply for a rehearing and submitted its petition for a rehearing on the grounds that the Supreme Court of Virginia's failure to consider the character of the County's actions, its failure to consider Omni's investment in the property, and the Supreme Court of Virginia's concept of reasonable investment-backed expectations all conflict with the federal law regarding uncompensated taking of property in violation of the Fifth Amendment of the United States Constitution. On February 28, 1997 the Supreme Court of Virginia denied Omni's petition for rehearing.

Omni now seeks the review of this Honorable Court.

REASONS FOR GRANTING THE WRIT

I. ***The decision of the Supreme Court of Virginia that the property owner's regulatory taking loss constituted a "mere diminution in value" even though the government's actions were illegal or did not advance a legitimate state interest, is in direct conflict with the decisions of the Supreme Court of the United States and the United States Court of Appeals for the Federal Circuit.***

The Supreme Court of Virginia's failure to consider the character of the County's actions directly

conflicts with this Court's decisions under the Fifth Amendment to the United States Constitution.

All regulatory consideration flows from Justice Holmes' proscription that

> the general rule . . . is, that, while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). As this Court has stated, if the regulation does *not* substantially advance legitimate governmental interests then a taking has occurred and there is no need to determine if there has been a denial of the economically viable use of the property. Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 314, 197 L.Ed.2d 677 (1987); Agins v. City of Tiburon, 447 U.S. 255, 261, 100 S.Ct. 2138, 65 L.Ed.2d 106, 112 (1979)(a taking occurs if the regulation *either* (1) "does not substantially advance legitimate state interests" *or* (2) "denies an owner economically viable use of his land.").

The Supreme Court of Virginia analyzed federal law on regulatory takings, and especially the partial takings claim, in a backward fashion. In its decision, the Supreme Court of Virginia held "it unnecessary to consider . . . the character of the County's action because *regardless of the legality or merit of the County's action*, Omni did not establish a regulatory taking of Omni's property under the Fifth Amendment." Board of Supervisors of Prince William County v. Omni Homes, Inc., (Appendix, page A-46) This is complete error. See, Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); Agins v. City of

Tiburon, 447 U.S. 255, 261, 100 S.Ct. 2138, 65 L.Ed.2d 106, 112 (1979). The Supreme Court of Virginia added that the economic impact was "not one of significant diminution in value." (emphasis added). Omni Homes, Inc., (Appendix, page A-46). In reaching this conclusion, the Supreme Court of Virginia begged the question because the Supreme Court of Virginia could not determine under federal law a noncompensable "mere diminution" versus a compensable "partial taking" until it had examined the character of the government's action. Examination of the character of the government's actions must be the initial inquiry because, as a matter of federal law, it is impossible for a loss to be a "mere diminution" if the government's actions do not substantially advance a legitimate governmental interest. See, Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); Agins v. City of Tiburon, 447 U.S. 255, 261, 100 S.Ct. 2138, 65 L.Ed.2d 106, 112 (1979).

The error in the Supreme Court of Virginia's reasoning is exemplified in its statement that "Had DLA sold Doves Overlook to a party other than the County, Omni would be in the same position in which it finds itself now . . ." Omni Homes, Inc., (Appendix, page A-44). The statement ignores the fact that the County is *not* some other party but is the government and is subject to constitutional restrictions not binding upon private individuals. For example, while a private individual could purchase every newspaper in town for the purpose of not allowing any opposing views to be published, the County may not do the same without violating the First Amendment right of free speech. The same is true in this case. Even though a private individual would have been free to purchase the neighboring property in order to prevent Omni from developing its property, the Fifth

Amendment prohibited the County from doing so because the County's actions did not advance substantial state interests.

The Supreme Court of Virginia's failure to recognize that the County's actions did not substantially advance any legitimate state interests violates Omni's Fifth Amendment rights under the U.S. Constitution and directly conflicts with this Court's decisions in Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 314, 197 L.Ed.2d 677 (1987); Agins v. City of Tiburon, 447 U.S. 255, 261, 100 S.Ct. 2138, 65 L.Ed.2d 106, 112 (1979).

II. *The decision of the Supreme Court of Virginia in this case involves the important federal question of whether there may be a partial compensable regulatory taking of private property under the Fifth Amendment to the United States Constitution, which has not been, but should be, decided by this Court.*

This case offers this Court a necessary opportunity to clarify "whether a regulatory taking requires that there be a denial of essentially *all* remaining economic use, or whether loss of a substantial part, but not all, of the economic use may constitute a compensable partial taking."

As stated by the Court of Appeals for the Federal Circuit:

> In Lucas, the Court discussed but was not called upon to decide the question of whether a regulatory taking requires that

> there be a denial of essentially *all* remaining economic use, or whether loss of a substantial part, but not all, of the economic use may constitute a compensable partial taking. The earlier cases sometimes use language that suggests that was so, and sometimes did not. Lucas itself contains a discussion that acknowledges both viewpoints. Lucas, 505 U.S. at ___ n. 8, 112 S.Ct. at 2895 n. 8.

Loveladies Harbor, Inc. v. U.S., 28 F.3d 1171, 1179-80 (Fed. Cir. 1994).

> The question remains, does a partial deprivation resulting from a regulatory imposition, that is, a situation in which a regulation deprives the owner of a substantial part but not all of the economic use or value of the property, constitute a partial taking, and is it compensable as such? This question has been much debated in the literature since the Supreme Court's decision announcing that as a general proposition regulatory takings are compensable; the Court's decisions to date have not provided an answer.

Florida Rock Industries, Inc. v. U.S., 18 F.3d 1560, 1568 (1994).

In its decision in this case, the Supreme Court of Virginia recognized that:

> Courts considering the issue since Lucas have continued to resolve Fifth Amendment claims involving less than a categorical taking of property by utilizing the traditional three-part test. See e.g., Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 643-47 (1993); Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., 65 F.3d 1113, 1123 (4th Cir. 1995; Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994); Loveladies Harbor, Inc. v. U.S., 28 F.3d 1171, 1179 (Fed. Cir. 1994).

Omni Homes, Inc., (Appendix, page A-40).

In this case, the trial court performed the required balancing test and found that, at a minimum, there had been at least a partial taking of Omni's property. However, the Supreme Court of Virginia failed to recognize the trial court's proper application of the traditional three part test. The Supreme Court of Virginia refused to examine the character of the County's actions, as required by that test, to determine if Omni was compensated by the public program of the County thereby "adjusting the benefits and burdens of economic life . . . in a manner that secures an 'average reciprocity of advantage to everyone concerned.'" See, Loveladies Harbor, Inc. v. U.S., 28 F.3d 1171, 1180 (Fed. Cir. 1994)(quoting from Lucas v. South Carolina Coastal Council, 505 U.S. __, 112 S.Ct. 2886, 2894, 120 L.Ed. 2d 798 (1992)).

By granting the writ and correcting the Supreme Court of Virginia's error, this Court can confirm that a regulation that deprives the owner of a substantial part

but not all of the economic use or value of the property constitutes a partial taking and is compensable.

III. *The decision of the Supreme Court of Virginia to ignore the property owner's investment in determining the loss in a claimed regulatory take is in direct conflict with the decisions of the Court of Appeals for the Federal Circuit.*

The Supreme Court of Virginia's refusal to consider the basis in the property from the point of view of Omni when determining the economic impact of the County's actions is in direct conflict with the decision of the Federal Circuit Court of Appeals in Florida Rock Industries, Inc. v. U.S., 18 F.3d 1560, 1571 (Fed Cir. 1994).

The evidence was unrefuted that Omni invested $1,067,000 in the property. As the Court of Appeals for the Federal Circuit stated in Florida Rock, when determining if there has been a compensable partial take under the Fifth Amendment to the United States Constitution:

> [T]he court should consider, along with other relevant matters, the relationship of the *owner's basis* or investment, and the fair market value before the alleged taking to the fair market value after the alleged taking. *In determining the severity of the economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored.*

(emphasis added). Florida Rock, 18 F.3d at 1567. While the trial court followed the Court of Appeals for the Federal Circuit's Florida Rock analysis on this point, an examination of the Supreme Court of Virginia's decision shows that the Supreme Court of Virginia did not. It virtually ignored as irrelevant Omni's investment in the property. The record showed that the County destroyed Omni's opportunity to recoup its investment because the developments were politically unpopular and the County wanted them to conform with current policy on zoning exactions.[2] Omni's investment was destroyed *not* because it failed to do something or the developer of the neighboring property refused to provide utility and road access. It was destroyed solely because the local government interfered. Using Omni's basis, it lost $717,000, not a "mere" $100,000.

The decision of the Supreme Court of Virginia in this case also conflicts with the decision of the Court of Appeals for the Federal Circuit regarding the determination of property value. The Supreme Court of Virginia's substitution of its own chimerical judgment as to value instead of the value evidenced by substantial testimony and the trial court's findings, and its refusal to consider Omni's basis or investment in the property conflicts with the federal law under Loveladies Harbor, Inc. v. U.S., 28 F.3d 1171 (Fed. Cir. 1994) and Florida Rock Industries, Inc. v. U.S., 18 F.3d 1560 (1994) regarding partial takings under the Fifth Amendment of the United States Constitution. In its decision, the Supreme Court of Virginia stated that "to base a property value on a factor which is required to develop

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[2] This Court has held that the government has the burden of showing a need for an exaction. Dolan v. City of Tigard, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

the property, but which never existed in fact or in law, distorts the fair market value analysis in this case." Omni Homes, Inc., (Appendix, page A-45). That statement is not only factually incorrect as to Doves Landing, it also conflicts with federal law and with the whole concept of measuring fair market value.

Approximately three days of evidence showed, and the trial court found, that the "factors" necessary to develop Doves Landing unequivocally existed. While the Supreme Court of Virginia made the assertion that Omni had no right to rely upon utility and road access through Doves Overlook, the trial court found not one shred of evidence to prove that, but for the County's illegal interference, Doves Overlook and Doves Landing would not have been developed and the required utilities and roads would not have been built. In fact, as the trial court painstakingly analyzed and found, *only the County's interference kept both developments from going forward.*

The Supreme Court of Virginia also mistakenly analyzed one important aspect of the property rights of Omni. Whether Omni had a written enforceable right to gain access through Doves Overlook was irrelevant since, as the trial court found, the extensive, intertwined and long-standing relationship and economics would have reasonably led to access from Doves Overlook to Doves Landing. In such an instance a written agreement was only a restatement of economic reality. Only the County's unwarranted intervention took the economic logic out of the equation and thereby killed the project.

The essence of the Supreme Court of Virginia's decision is that the County was free to engage in conduct that interfered and destroyed Omni's project even if that conduct was illegal and did not advance any substantial state interests because the lack of a written agreement for

road and utility access made it less than *absolutely certain* that the project would have otherwise been completed. In other words, under the Supreme Court of Virginia's illogical conclusion, reasonable expectations must in fact be "certainties."

The Virginia Supreme Court further implied that only "certainty" could rise to a property right.

The Supreme Court of Virginia's reasoning regarding "certainty" versus "reasonable probability" in determining expectations leads to absurd results. A plaintiff would have to prove a negative to prevail. Using a tort example, a plaintiff no longer able to work because of the negligence of another would have to prove with certainty that tomorrow and the day after tomorrow lightning will not strike and kill him in order to recover damages based upon his life *expectancy*?

The Supreme Court of Virginia should have focused on reasonable probability not certainty. No County should be able to destroy the probability of success with its wrongful conduct and then emerge unscathed merely because some remote, unproven and speculative uncertainty existed.

The Virginia Supreme Court further erred in analyzing value with the standard of "certainty." Economic logic determines fair market value. Fair market value always depends upon the "contingency" that the landowner will find a buyer willing to pay a certain price. Yet, under the Supreme Court of Virginia's analysis, any fair market value placed on a planned development becomes "distorted" unless it too is based on certainty.[3] This is absurd. Surely the law cannot require

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[3] Under the Supreme Court of Virginia's analysis, even if the utilities and roads were in place the appraisal would still be "distorted" unless there were enforceable agreements to

an appraiser to rely only upon the existence of binding contracts before he or she may opine as to the fair market value. All appraisers speculate to some extent - that is obviously their job. As the Court of Appeals for the Federal Circuit stated in Florida Rock, even

> a speculative market provides a landowner with monetary compensation which is just as satisfactory as that provided by any other market.

Florida Rock, 18 F.3d at 1567.

> When the market provides a well-substantiated value for a property, a court may not substitute its own judgment as to what is a wise investment.

Id.

The appraisals submitted by both sides were well substantiated. Nevertheless, in its decision, the Supreme Court of Virginia substituted its own unsubstantiated appraisal judgment regarding a wise investment. The reasonable probability that Doves Landing would have utilities and roads through Doves Overlook was confirmed by one witness after another including representatives of the owner, developers, engineers and appraisers who testified to the value of Doves Landing prior to the County's acquisition of Doves Overlook. The trial court found that a reasonable buyer, looking at those facts and circumstances, would pay $1,200,000.00 for the property. Value was real and only the illegal and

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purchase each and every finished lot. This is the circular reasoning attacked by this Court in Lucas.

unwarranted action of the County destroyed that value. Value was *not* destroyed because the developer of Doves Overlook refused to provide access.

The facts irrefutably proved at trial, and the trial court found, that the County "went too far." Neither the County nor any other government body should be rewarded for its misdeeds. The decision of the Supreme Court of Virginia, if left in place, will grant the County and all other counties in Virginia a license to engage in similar bad conduct in violation of property owners' Fifth Amendment rights with impunity so long as they can point to some possibility, *no matter how remote*, that the planned use of the property would not otherwise be accomplished. This is the true precedent of this case.

Accordingly, this Court should grant the petition in order to resolve this conflict between the Supreme Court of Virginia and the Court of Appeals for the Federal Circuit.

IV. *The decision of the Supreme Court of Virginia involves the important undecided federal question of whether a property owner's reasonable investment-backed expectations should include the expectation that the government will act illegally or in a way that does not advance legitimate state interests.*

Under the Fifth Amendment, reasonable investment-backed expectations address the ability of a property owner to "demonstrate whether they bought their property in reliance on a state of affairs that *did not include the challenged regulatory regime.*" (emphasis added). Loveladies Harbor, Inc. v. U.S., 28 F.3d 1171, 1177 (Fed Cir. 1994). In other words, were the County's

actions foreseeable? Certainly illegal and meritless actions are not foreseeable. Title to property does not include the "implied limitation" that the state may act egregiously. See, Lucas v. South Carolina Coastal Council, 505 U.S. __, 112 S.Ct. 2886, 120 L.Ed 2d 798 (1992). Yet the Supreme Court of Virginia has held that the County may interfere with Omni's investment-backed expectations "*regardless of the legality or merit of the County's actions*" thereby making it a matter of law in Virginia that one should expect illegal and meritless government actions.

The Supreme Court of Virginia's characterization of Omni's claim as an attempt to have the government insure the success of Omni's investment is meritless. No developer may claim such a guarantee. However, all developers, Omni included, are entitled to a guarantee that they may make an investment

> under the working assumption that the Government will neither prejudice private citizens, unfairly shifting the burden of a public good onto a few people, nor act arbitrarily or capriciously, that is, will not act to disappoint reasonable investment-backed expectations. The Government, in a word, must act fairly and reasonably, so that private parties can pursue their interests.

Florida Rock, 18 F.3d at 1571.

Omni adopted no unreasonable expectation. It did not gamble. The Supreme Court of Virginia has now told Omni that it should have entered into a written enforceable agreement with DLA to anticipate the improper actions of the County because it was

foreseeable that the County would act unfairly and capriciously to sabotage the project. Omni failed to put in writing that which market, logic, and U.S. Constitutional law assured it it could do without a written agreement - develop jointly with Doves Overlook without governmental interference.

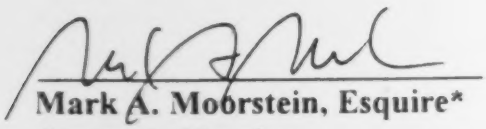
If this Court examines the record and focuses on the actual reason Doves Landing was not built (i.e., the County's actions) and the improper reasons for the County's actions, it will see that the Supreme Court of Virginia's decision in this case now makes it unreasonable for any property owner in Virginia to purchase property with the expectation that the government will *not* try to sabotage a development or act capriciously and unfairly. Surely this Court never intended the concept of reasonable investment-backed expectations to include any such expectation. This case offers this Court the opportunity to make it clear that as a matter of law no property owner should ever be required to expect the government to act to sabotage the property owner's plans or to act arbitrarily and capriciously.

CONCLUSION

The Supreme Court of Virginia has inconsistently applied the law. The Supreme Court of Virginia's failure to consider the character of the County's actions, its failure to consider Omni's investment in the property, and the Court's concept of reasonable investment-backed expectations all conflict with the federal law regarding uncompensated taking of property in violation of the Fifth

Amendment of the United States Constitution. If unchanged, the decision, in violation of the United States Constitution, will allow government in Virginia to take from a property owner without paying compensation so long as there is any value left in the property regardless of whether the government's action is unwarranted or illegal, and it will render the term reasonable investment-backed expectations a sham. By granting the writ in this case, this Court will be able to reverse the errors of the Supreme Court of Virginia and to bring the law of Virginia into line with the decisions of this Court as well as decsions of the Court of Appeals for the Federal Circuit. It will also allow this Court to clarify whether or not a partial uncompensated regulatory take violates the Fifth Amendment, whether the property owner's investment in the property should be considered in determining if the loss in value is substantial, and whether it is unreasonable for a property owner to have the investment-backed expectation that the government will not act illegally or in a manner that does not advance a legitimate state interest.

Respectfully
Submitted,



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APPENDIX

Decision of Judge Richard B. Potter, Circuit Court of Prince William County, Virginia, dated November 1, 1995: Omni Homes, Inc. v. Board of Supervisors of Prince William County, In Chancery No. 36345 ..... A-2

December 8, 1995 Final Decree In Chancery No. 36345 ..... A-34

Decision of the Supreme Court of Virginia: Board of Supervisors of Prince William County v. Omni Homes, Inc., 253 Va. 59, _____ S.E.2d _____ (1997) (Record No. 960508) A-35

February 28, 1997 Order of the Supreme Court of Virginia denying Motion to Rehear in Record No. 960508 ..... A-52

Decision of Judge Richard B. Potter, Circuit Court of Prince William County, Virginia, dated November 1, 1995: Omni Homes, Inc. v. Board of Supervisors of Prince William County, In Chancery No. 36345 (Transcript pages 2393 - 2446)

THE COURT:

Thank you, gentleman, for coming today. I appreciate you giving me the opportunity of reading again some of the law in this case. I don't have to tell you that this is a very complex case. I know it's very important to the parties. But it's a very complex case in its facts, it's a very complex case in the law and the analysis that I must make.

The Court also feels that it's a complex case because the status of the law in Virginia is somewhat unsettled in light of the fact of recent Federal Supreme Court cases.

But it's the opinion of the Court as follows. Let me say I'm going to read the opinion into the record so you'll have that available to you.

I would ask counsel to prepare an order reflecting the Court's decision, simply addressing the Court's decision rather than putting in all the reasons for the decision. You may simply say in the order that it reflects the findings of the Court, and the reasons of the Court stated on November lst, 1995.

Here's the opinion of-the Court.

In this case the plaintiff, Omni Homes, Inc., referred to as Omni, has filed an amended complaint for declaratory judgment and seeks a judicial determination that the defendants, the Board of Supervisors of Prince William County, Virginia, et al., referred to as the County, has engaged in regulatory conduct that has caused the compensable taking or damage to the

plaintiff's property in violation of the Federal and Virginia constitutions. And plaintiff seeks injunctive relief and compensation pursuant to Virginia Code Section 8.01-184.

The issues presented by the plaintiff are:

One: whether the conduct of the County in delaying the approval of the preliminary subdivision plans of Omni by use of the County ordinances authorized by Virginia Code Section 15.1-465 et seq. for land subdivision and development, and in purchasing the land adjoining Omni's property by authority granted by the legislature to the County by Section 15.1-262, et seq., constitutes regulatory conduct. And two; whether the complaint is barred by the statute of limitations. And three: whether the conduct of the County rises to the level of a taking or damage under the federal and state constitutions.

Having found that the conduct of the County does constitute regulatory conduct, and that the complaint is not barred by the statute of limitations, and that the conduct of the County goes too far by denying Omni all economic and viable use of its property, by interfering with Omni's reasonable investment-backed expectations and by interfering with Omni's right to use the property as it is zoned, the Court grants the declaratory judgment and awards damages to Omni in the amount of $850,000 with interest, to run thereon at the legal judgment rate from this date until paid in full.

Number 1, the facts.

The facts in this case are complex, but they may be oversimplified for the sake of some brevity in the following manner. This case involves the attempted development of two parcels of unimproved land located in Prince William, County, Virginia, on a peninsula of land at the confluence of the Occoquan River and Branch

Run. These two parcels of land are part of an area in the County that has been zoned for R-10 urban residential subdivision for well over 10 years. An R-10 zone permits the subdivision ofone lot per 10,000 square feet, or quarter acre lots. In terms of use Omni's property was totally unused. It was idle and undeveloped with no buildings whatsoever.

The evidence of both parties hereto clearly showed that the only economically viable use of this property was to use it for the development of building lots under one zoning category or another. In terms of value, the most attractive feature of this property was that it was already zoned R-10 with a high density use, and the zoning contained absolutely no proffers to limit the development of the property.

The largest parcel of land that adjoins Omni's property contains an aggregate of some 188 acres and was purchased by a partnership known as DLA that proposed to develop the property as Doves Overlook subdivision, with eventually some 405 residential building lots. DLA, or Doves Lane Associates, is not a party to this suit.

The second parcel of land, Omni's property, to the east of Doves Overlook, contains 72.68 acres and was purchased by Omni, which proposed to development the property as Doves Landing subdivision. with eventually some 106 residential lots. There was no unity of ownership. The properties were owned by separate entities but some of the individuals involved were on friendly terms, and others were even doing business together on other properties.

Initially DLA and Omni had competed with one another when negotiating to buy the various parcels that made up Doves Overlook. But eventually they realized that their competition was only increasing the purchase

price, so they entered into an agreement so that DLA could purchase Doves Overlook and Omni would buy Doves Landing without further competition.

From the very beginning there was an informal understanding between the principals of Omni and DLAthat in the event that Doves Overlook was developed as an R-10 subdivision, then DLA would permit Omni to, "Piggyback," on its plans so that the road access and public sewer and water could run through Doves Overlook and into Doves Landing. By doing this they "agreed to agree" later that they would enter into a cost sharing agreement in which Omni would pay its prorata share of the road utility extension costs on a per lot basis.

Neither party signed a written agreement this early in the development process because neither party wanted to encumber their property with easements or cost sharing agreements until the plans became more definite. There were too many issues to be revolved for both parcels in the development process. Later, Omni had its lawyer prepare such an agreement, but it was never signed.

DLA did not include the interconnections access and utilities in its plans initially based on advice of counsel to allow its plan to legally stand on its own. And DLA only changed the plans later when requested by Omni and the County for the change. And after the preliminary plan for Doves Overlook was approved by the County planning commission and the first plat for the final plan process was submitted, DLA agreed to sell the parcel to the County.

Omni clearly did not have a contract right to use Doves Landing through Doves Overlook, nor could it compel DLA to grant any such right. But throughout the development process Omni had the reasonable investment-backed expectation that it could develop

Doves Landing in an R-10 use by using Doves Overlook, and such a development would be of beneficial use to DLA or any other owner of Doves Overlook. And any method used by Omni to develop Doves Landing as an R-10 subdivision would necessitate an acquisition by Omni of additional off-site easements and the construction of improvements to provide an access road is to the subdivision, as well as Omni bearing the cost of construction of the extension of public sewer and water to the property.

These facts were just as clear to Omni when it purchased Doves landings as they were to the County when it purchased Doves Overlook. The development of Doves Landing was functionally and economically dependent on the development of Doves Overlook.

In considering the use, both functionally and economically, that Omni could make of Doves Landing, it is essential to view that element of this case in terms of three distinct periods of time.

First, the time at which Omni contracted to buy the land, on October 23, 1986; second, the time that Omni went to settlement and actually purchased Doves Landing, on January 16, 1988; and thirdly, on October 5, 1993 when the County agreed by consent decree to buy Doves Landing from DLA. What was economically feasible in 1986, may or may not have been economically feasible in 1993. When Omni first purchased the property, it had numerous physical and functional limitations which had to be overcome in order to develop the property as permit in the R-10 zone. As noted earlier, the problem was the property lacked the proper access roads and necessary public sewer and water to be used as it was zoned.

The state maintained portion of the existing access road, known as Doves Lane, ended before the boundary

line of the Doves Landing property, and the only actual access was a narrow gravel drive along a 30 foot prescriptive easement.

If Doves Landing was to be developed as a residential subdivision it had two choices when it came to access road. Either additional easements would have to be purchased along Doves Lane from an adjoining property owner, other than or together with DLA, or a new road would have to be designed through Doves Overlook intoDoves Lane. At the same time, Omni could not develop the property as an R-10 subdivision until it extended the public sewer and water facilities from the existing lines that were some two to three miles away. And again, when it came to sewer and water Omni had two choices. It either paid the full cost of extending the public sewer and water to Doves Landing, or it shared the cost with an adjoining property owner, like DLA.

At the time Omni purchased the land these inherent limitations meant that there were only five possible uses functionally and economically. And each use had certain limitations.

One; Omni could attempt to develop the property in its R-10 zone with a new access road and sewer and water extended through Doves Overlook and with a cost sharing agreement for these off-site improvements with the owner of Doves Overlook. This use was always conditional because it was conditioned on the owner of Doves Overlook obtaining prior approval for that property, and in fact, agreeing to the cost sharing scheme and on meeting the usual requirements of subdivision development found in the County Ordinances as authorized by Virginia Code Section 15.1-465, et seq. This was functionally possible, and, it was also clearly the most economically viable use for Doves Landing.

Or, two: in the alternative Omni could us the property as an R-10 subdivision by paying the entire cost of the off-site improvement, access and utilities, without using Doves Overlook. But this was never an economically viable alternative, even if the land could be purchased at a price based on A-1 zoning because the cost of bringing the sewer and water to the site and improving the access could never be recovered by the sale of the lots.

After Omni purchased this property at a price based on R-10 use it was clearly not economical, and afterOmni had spent thousands of dollars for development plans and engineering and litigated with the County there was no way it could recover its development cost. And this is the key time to determine the economic effect on Omni.

When the County purchased Doves Overlook it eliminated the only economically viable use of the property as R-10, which was and is Alternative 1. The key inquiry here must be the impact of the government regulation on Omni, and not on some potential purchaser of the property at the time the County purchased Doves Overlook.

Three; before Omni purchased the property, it could be down-zoned to a lesser residential density use, such as R-1 or R-5, with adjoining property or without adjoining property. But because the sewer and the water would still have to be extended, and because the access issues would still have to be resolved, this too was not an economically viable use of the land. After the purchase Omni paid the price of the R-10 use, even at a discounted price because of the risk involved in developing the property, and R-1 would not then be economically viable.

At the time the County purchased Doves Overlook Omni had again expended thousands of dollars in the

development process, including a new application to the County to down-zone the property; or that is, a condition would include new application to the County to down-zone the property, and with litigation costs incurred it was entirely not economically a viable use.

Four; Omni could down-zone the property to A-1 and develop the property into four or more large lots, either on public utilities or on septic fields or with spray irrigation devices in place of public utilities. The access cost might not have been as great but if public sewer and water were needed then it would not be economically feasible. When Omni purchased the land it was economically feasible to down-zone the land to A-1, subject to the down-zoning process, and then to develop the land into four or five lots with limited access on septic fields. But by the time the County purchased Doves Overlook Omni had expended thousands of dollars to engineer, plan and develop the property, as well as attorney fees in litigation against the County, so that it was clearly not economically feasible for Omni to use the property as an A-1 subdivision with large lots.

Five; Omni could simply hold title to the property for investment purposes for possible future R-10 type use and either "flip" the property, that is sell it to another buyer, or hold the property in speculation for future development as an R-10 subdivision when the necessary access and utilities became more readily available.

When Omni took title this too was an economically viable use; but by the time the County purchased Doves Overlook this was not an economically viable use. The net effect is that when Omni had five functional uses, and three economically viable uses, (Alternatives 1, 4 and 5) when it purchased the property, but by the time the County purchased Doves Overlook and thereby terminated Omni's submitted plan

for Doves Landing there were no economically viable alternatives for Omni in the subject property.

The principals of Omni were experienced in land development and the risk involved with that process. Even with all the inherent title limitations, which were well known to Omni before it agreed to buy the land, Omni still proceeded to enter in contract to purchase the property on October 23, 1986.

The contract contained a feasibility study period that was extended from time to time as Omni went about having its engineers prepare plans for R-10 subdivision in conjunction with Doves Overlook.

DLA filed its application for the preliminary plan for Doves Overlook on October 8, 1987 and Omni filed its preliminary plan, prepared by their own engineers, on January 12, 1988. At time their plan was filed Omni had the land under contract but had not settled on title to the property. There followed an extensive period of delay in the initial development process for both Doves Overlook and Doves Landing.

The period of delay may be divided into two parts; one from the date of first submission of the plan by Omni, January 12, 1988, to the date of settlement on its contract, January 16, 1989, and one from the date of settlement to the date the County agreed to purchase Doves Overlook, when the approval process on Doves Landing came to an end for all intents and purpose, on October 5, 1993, a total period of some five years and nine months.

The reasons for these delays were many and complex. The evidence showed that while there was no set time for plan approval this was an inordinately long delay, and all the parties involved bear some is responsibility.

The County expressed legitimate concerns about the lack of sufficient access road and public sewer and water, and the impact the project would have on the surrounding property. And while part of the delay was due to the normal delay for such a process, it soon became evident, based on the numerous denials and comments by the various agencies of the County, including the County attorney, that the County concluded that it was not in the County's best interest to grant permission to develop Doves Overlook or Doves Landing to a density permitted in the R-10 zone.

The County, through its planning and development staffs, then embarked on the systematic effort to impose its conclusions on the property owners, and to repeatedly suggest, expressly and impliedly, that they should down-zone their property or the plans would not be approved.

This policy was evident in many ways; including, as stated, the numerous reports and comments by the planning staff and the County attorney, and even the involvement of local supervisors in a political campaign.

But it is especially evident by, one; the County's efforts to reconcile the zoning density in the R-10 zone of one unit per 10,000 square feet, to the density called for in the County Comprehensive Plan of one to five acres per dwelling unit, as recommended by the so-called, "Stale Zoning Report," and implemented by the County in their summary review letters to the owner and reports to the County attorney. In a related matter; Two, the County adopted the so-called "Sewer in the Green" policy to limit the use of public water and sewer in those green colored portions of the comprehensive plan, which included Doves Overlook and Doves Landing.

And three; the County then required a review of the plans under Section 15.1-456 of the code because they

did not view the sewer and water extensions as normal extensions.

And four: the County then imposed the requirement of an approved and bonded road in the preliminary rather than the final plans.

And five; the additional regulations adopted by the County, well after the owners had purchased their two parcels, were imposed on the properties, including review under the Chesapeake Bay Protection Act, that specifically included unproffered property such as Doves Overlook and Doves Landing.

While many of these actions by the County involved legitimate concerns of the County, some were in violation of the law; as the parties learned in the litigation that ensued as the owners tried to force the County not to impede the approval process. There were several lawsuits. In fact, on one occasion the County advised Omni that it would only continue to process its application if Omni would just file suit against the County.

Finally the local circuit court concluded that the zoning laws took precedence over the requirements of the comprehensive plan, and no review was necessary under 15.1-456.

The County's unsuccessful appeal, while well within its rights, only resulted in additional delay for the owners.

Omni too was responsible for some of the delay in the process. Because Omni had elected on its own to submit a plan that was dependent on the development of Doves Overlook, Omni had no choice but to wait until the developmental concerns for Doves Overlook could be resolved. And any delay in processing of Doves Overlook, by necessity, also contributed to the delay in the processing of Doves Landing.

Omni elected to go to settlement and purchase Doves Landing on January 16. 1989. And in order to understand their investment-backed expectations it is necessary to consider the status of the plans when it became the legal owners of Doves Landing. At the time of that settlement neither the preliminary plan for Doves Overlook, nor the preliminary plan for Doves Landing had been approved by the County. Omni and DLA still had no written or enforceable cost sharing agreements.

While DLA's third submission had been rejected by the defendant by summary letter on December 8, 1988. they had. entered into a consent decree with the County in one of the lawsuits that would allow them to continue the approval process. At the same time the County had rejected Omni's first submission for Doves Landing, and on October 21, 1988. the County even advised Omni that the file on Doves Landing was closed. But when the circuit court returned a decision in favor of DLA in one of the cases,. as noted above, Omni correctly concluded that the County not force DLA or Omni to down-zone the property imposing the comprehensive plan: that the County could not delay the process further by requiring a 15-456 review. and that DLA would, in all likelihood, be successful in its application to subdivide Doves Overlook.

In fact. while the owners continued to process their plans. the matter. by agreement. was put on hold from December 22. 1988, while the County appealed the decision. until January 3. 1990. when the Supreme Court denied the zoning administrator's appeal.

A little over one month later the planning commission finally approved the preliminary plans for Doves Overlook. Nevertheless. the County continued to delay the approval process for both properties. In all there were six separate submissions for Doves Overlook,

and four for Doves Landing. DLA again filed suit on June 11, 1991, and in October 5, 1993, in settlement of that suit, unable to stop the development of the property at an R-10 density by use of the regulatory subdivision process, the County agreed to purchase Doves Overlook for $3.7 million, a price clearly based upon the R-10 use.

The County purchased the property not by eminent domain, but by virtue of the authority vested in it by Virginia Code Section 15.1-262, et seq. At the time of the purchase, while the County was well aware that Doves Landing was dependent, that is the subdivision plan for Doves Landing was dependent on Doves Overlook, the County made no provision for Omni.

Since the consent decree on October 5, 1993, the County has taken no action whatsoever to use or develop Doves Overlook property, including as an R-10 subdivision. On April 18,1994, Omni filed its complaint for a declaratory judgment in which it seeks the judicial determination that the regulatory conduct of the County, including its policy of delay of the approval process and its purchase of the adjoining property, resulted in a direct interference with its reasonable investment-backed expectations and therefore a compensable taking and/or damages as defined by the federal and state constitutions.

Two: status of the law.

First the status of the federal law. The Court finds that the status of the federal law can be found in the most recent description of that status Loveladies Harbor Inc. v. U.S., 28 F.3rd 1171 (Fed. Cir. 1994) where the Court found: "Any discussion of a takings claim necessarily begins with the Fifth Amendment to the Constitution, which concludes with the mandate, 'nor shall private property be taken for public use without just compensation.'" U.S. Constitution Amendment V.

At the time the Constitution was written and for almost 150 years after, the concern was with physical occupation of private lands by the government.

In 1922, in the case of Pennsylvania Coal v. Mahon, 260 U.S. 393, Justice Holmes stated this often quoted proposition: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

In 1926, the then innovative and rapidly spreading practice of state regulation of private land use through zoning, was challenged as fundamentally having taken regulation, "too far."

The Supreme Court, in part by analogizing zoning to the historic common law control of nuisances, upheld against the charge of facial invalidity, the power of the government to enact and implement zoning laws. Euclid v. Ambler Realty Co., 277 U.S. 365 (1926). However; with a nod to Justice Holmes, the Court noted that in an individual case a zoning rule as applied could violate the protections provided by the constitution. Two years later the Court struck down the specific applications of the Cambridge Massachusetts Zoning Ordinance to Mr. Nectow's property as violative of the federal constitution, in Nectow v. City of Cambridge, 277 U.S. 183 (1928).

For the next 50 years zoning fights were played out in the state courts with little further guidance from the Supreme Court. Specific applications of zoning ordinances were upheld or struck down as the state court's determined, earning for some courts the epitaph of super zoning board.

Two key questions eventually emerged in the discourse about our Fifth Amendment Regulatory Takings. One, were there objective legal criteria by which a regulatory taking could be identified, or was it necessarily an ad hoc inquiry left to the discretion of each

Court: and two, was the remedy for a regulation that went too far a post hoc declaration of invalidity leaving the property owner to bear the cost of the illegal restraint during the time, often years, it remained in effect, or could a court declare the restraint valid, that is within the power of the government to impose but require the government to pay the just compensation referred to in the Fifth Amendment's mandate.

In 1978 the Supreme Court re-entered the debate with an initial answer to the first question. The Court in Penn Central Transportation Co. v. New York City, 438 U.S. 194 (1978) refined the notion of when a regulation went too far. Three criteria would be determined, or would determine the outcome. One, the character of the governmental action; two, the economic impact of the regulation on the claimant; and three, the extent to which the regulation interfered with the distinct investment-backed expectations.

The first criteria required that a review in court consider the purpose and importance of the public interest reflected in the regulatory imposition. In effect, the Court was to balance the liberty interest of the private property owner against the government's need to protect the public interest from imposition of the restrain. This included consideration not only of the avowed need of the government - the interest of the public being protected - but also whether the method of obtaining the sought after goal was reasonably designed to attain it.

The second criteria, the economic impact of the regulation on the claimant, was intended to ensure that not every restraint imposed by the government to adjust the competing demands of private owners would result in a takings claim. It cites the Pennsylvania Coal Case again, reflecting in part the presumed fact in the case.

What emerged was a threshold requirement that the claimant show a serious financial loss from the regulatory imposition. This came to be phrased a denial of "economically viable use of an owners land."

The third criteria, interference with distinctive investment-backed expectations, was a way of limiting taking recoveries to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.

A reasonable investment-backed interest or expectation must be more than a unilateral expectation or an abstract need. In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms it, could be said that the market had already discounted the restraint so that the purchaser could not show a loss in its investment attributable to it. Since no taking was found to have occurred in the Penn-Central case the Court did not answer the second question raised above, whether given a regulation that constitutes a taking so that just compensation is required when demanded, or whether a declaration of invalidity is enough. This question was finally and definitively answered by the Court after a number of false starts in First English Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987). The Constitution, said the Court, requires just compensation for a regulatory taking from the date it occurs until the dates of-the regulation's decision or amendment. A simple post hoc declaration of invalidity did not provide the remedy the Constitution mandated.

The Court, in Loveladies, then goes on to state that the state of the takings law at the time that the Loveladies case was decided, and how it has been changed over the years. It then approached the takings

law as applicable rather to the Loveladies case as opposed to the earlier cases.

June 29, 1992, marked the decision in Lucas v. South Carolina Coastal Council, 505 U.S. 112 S.Ct. 2886, 120 L.Ed. 2d. 798 (1992). Mr. Lucas had purchased two ocean front lots with the intention of building a home for himself on one, and a house for sale on the other. Between the time he purchased the property and the time he was ready to build the state enacted legislation aimed at preserving and protecting the fragile ecology of the beach in that area. Pursuant to the legislation, a state agency had termed that no buildings could be constructed ocean-ward of a line drawn on the upland of Lucas's property, thus precluding Lucas from building on his property.

There was no question that Lucas had distinct investment-backed expectations for his property, and despite the state's argument that Lucas still retained the untenable right to use his property to view the waves and to cross upon it to the beach, and to presumably pay the real estate taxes on it, there was little doubt that the economic value of his property had been essentially destroyed by the regulatory imposition.

The Supreme Court of South Carolina in a split decision, reversed. The Court held that the determination by the South Carolina legislation to preserve and protect the state's ocean front ecology reflected a paramount public policy; which when balanced against the private property rights of the individual require that the property rights yield. There was no governmental taking under the Fifth Amendment, and no compensation was avowed.

The Supreme Court, of course, instead, recast the issue. The question, said the Court, was not one of balance between the competing public and private lands,

rather the question was simply one of basic property ownership rights. Within the bundle of rights, which property lawyers understand what constitutes property, is the right or interest at issue as a matter of law, owned my the property owner or reserved to the state.

In sum, the Court went on to restate the law of regulatory taking as it applied in the Loveladies case, and I would submit to you that that is the status of the law as it applies in this case.

It concluded; A, the property owner who can establish that a regulatory taking of property has occurred is entitled to a monetary recovery for the value of the interest taken measured by what is just compensation. B, with regard to the interest alleged to be taken there has been a regulatory taking if; one, there was a denial of economically viable use of the property as a result of the regulatory imposition; two, the property owner had distinct investment-backed expectations; and three, it was an interest vested the owner as a matter of state property law and not within the power of the state to regulate under common law nuisance doctrine.

As to the first requirement, that is the denial of economically viable use of the property, the Court went on to say that in Lucas the Court discussed but was not called upon to decide the question of whether a regulatory take requires that there be a denial of essentially all remaining economic use, or whether a loss of a substantial part but not all of the economic use may constitute a compensable partial taking. The earlier cases sometimes used language that suggest that was so, and sometimes did not. Lucas itself contains a discussion that acknowledges both viewpoints.

Finally in Florida Rock Industries, Inc. v. United States, 18 F.3rd 1560 (Fed.Cir. 1994), the Court concluded that depending on the legal import of the final

market value before and after the regulatory imposition on a particular property involved, a partial taking may have occurred. The Court explained that in making that determination there was a, "difficult task of resolving when a partial loss of economic use of the property has crossed the line from a noncompensable 'near diminution' to a 'compensable partial taking'."

The reference to "near diminution" is to those decreases in property value resulting from shared economic impacts which are the consequence certain types of lands use controls. Those in which the property owner has, in a sense, been compensated by the public program "adjusting the benefits and burdens of economic life to promote the common good", and cites the Penn Central case.

The Court in Lucas described it as, "adjusting the benefits and burdens of economic life a manner that secures an average reciprocity of advantage to everyone concerned." As to the second element, that is the requirement of a showing that the use of the property as a result of a regulatory imposition -- excuse me, requirement of a showing that the property owner distinct investment-backed expectations, according to that case found that with regard to this criteria it was not disputed that the plaintiff in that case purchased the land involved with a reasonable expectation and intention of developing it over time for sale to purchasers of the improved lots, that the regulation constitutes an interference with the investment-backed expectations could not be denied.

As to the third requirement, that it was an interest vested in the owner as a matter of state property law, and not within the power of the state to regulate under common law nuisance, the case of Loveladies went on to review that particular requirement and found that what

remained then in light of Lucas in consideration of the third criteria, the question of whether under controlling law the regulation imposed goes beyond the government's power under common law nuisance doctrine and thus constitutes a taking. And it went into the discussion about this concept of the nuisance doctrine and its application in this case. The Court finds that to be the status of the federal law.

Secondly, of course, we must review the state law involved in this case. It is necessary in this case to review the state law not only because the plaintiff has alleged a violation of the taking clause of the state constitution, but because rights in land depend on the law of a particular state. As the Supreme Court stated in Ruckelshaus v. Monsanto Company, 467 U.S. 986 (1984), property interests are not created by the Constitution, rather they are created and their dimensions are defined by existing rules and understandings from an independent source such as the state law.

Any review of the state law in Virginia begins with the constitution, and specifically Article 1, Section 11, which protects private property from being, "taken or damaged for public uses without just compensation."

But in order to show that the defendant's conduct amounted to a compensable "taking" under state law, the plaintiff must show that it was deprived of all, with emphasis on the "all", economically viable uses or all the right to sell, as set forth in the numerous cases cited by counsel in this case, including Commonwealth ex rel. v. County Utils., 223 Va. 534 (1982); City of Virginia Beach v. Virginia Land Investments Assoc. No. 1, 389 S.E.2d 312 (1990), et cetera.

Repeatedly the courts have noted that while each citizen holds property subject to the proper exercise of police power for the common good, and even where such

an exercise results in substantial diminution of property values, an owner has no right to compensation therefore. No taking occurs in these circumstances unless the regulation interferes with all reasonable beneficial uses of the property taken as a whole; Commonwealth ex rel. v. County Utils. Corp., 223 Va. 534 (1982).

This emphasis on "all" means that diminution of the saleability or potential market value does not rise to the level of a constitutional taking or damage to the property. And I would cite Bartz v. Bd of Supervisors of Fairfax County, 237 Va. 669, 379 S.E.2d 356 (1989).

On the other hand the word "damage" as used in Article 1, Section 11 of the Virginia Constitution means damage in the legal sense. That is, damage resulting from a legal invasion as opposed to the mere physical invasion of the property or the property rights. This requires a showing of damage to the corpus of the property itself, or to some appurtenant right or easement connected therewith, or by the law annexed thereto which is directly (that is, in general if not always, physically) affected, and is also specially affected (that is in a manner not common to the property owner and to the public at large); and such direct and special injury must be such as to depreciate the value of the owner's property. And I would cite for that proposition also City of Lynchburg v. Peters, 159 Va. 40, 159 S.E. 769 (1931).

Just as the courts have recognized that not every taking is a compensable taking, the courts have also ruled that not every damage is a compensable damage. As the courts have noted, the history of the origin and cause of this process, a consideration of the mischief intended to be rewarded, show that it was not the intention of the Constitution to create a right and to give a remedy in all cases of consequential damages which may result from

the exercise of legislative power by the appropriation of private property. I would cite again the Peter's case.

And also I would point out in the Lambert case, which, as you know, I found to be an interesting case to the Court, in the case of Lambert versus City of Norfolk, 108 Virginia, a 1908 case, where the Court concluded that the mere fact that private property is rendered less desirable for some purpose, or even less saleable, does not constitute damage within the meaning of the constitution. The Court finds that to be the status of the law in Virginia.

Number 3, the issues and analysis. The issues presented in this case are as complex and as unique as are the facts. First, the defendant questions whether or not the conduct of the defendant can be construed as regulatory conduct necessary to trigger any consideration of the takings clause, federal or state.

Here there are two types of conduct that are two types of conduct that are objected to by the plaintiff. The first is a delay in the development process for Doves Landing subdivision approval. The subdivision approval process, like the zoning process, clearly involves conduct by the defendant in accordance with its ordinances that regulates the permitted uses of Doves Overlook, and Doves Landing of course, and it is therefore regulatory conduct. For all intents and purposes, the County has advised the plaintiff that it will longer process the submitted preliminary plans for Doves Landing.

The second conduct, and clearly the most unique feature of this case, is the purchase of Doves Overlook by the County. This is an awesome exercise of the power of the County that bears close scrutiny by this Court. Surely the conduct of the County this case must have a chilling effect on every land developer in the Commonwealth of Virginia.

It is not difficult to understand why all the developers who testified said they were shocked and surprised by the County buying Doves Overlook. While it is well known that the purchase of real estate for the purpose of development is a risky business, fraught with many potential pitfalls, including the vagaries of obtaining the necessary permits and approvals and dealing with the local governments and state agencies, every owner and developer is entitled to a level playing field where the rules of zoning and subdivision plan approval apply equally to all parties.

In this case you have the same County government that regulates the granting of subdivision approval, exercising its power to spend tax payer dollars to buy the adjoining property with the effect, if not the purpose, of blocking the development of the subject property. This is not to question the purpose for which Doves Overlook was purchased. There is no question raised here that the County had the authority and legal right to purchase Doves Overlook. The plaintiff does not complain about the purpose, but about the effect.

The Court finds that the County's purchase of Doves Overlook may be construed as regulatory conduct for the purpose of the taking clause considerations. It makes little difference if title to adjoining property is acquired by eminent domain or by purchase, as in this case, if the effect of that purchase is to cause a compensable taking or damage to the adjoining owner.

The second issue in this case turns on the first. The defendant contends that if the purchase cannot be construed as a regulatory taking then the last regulatory act of the defendant was the County's letter of June 7, 1990, advising the plaintiff's engineer that the plans for Doves Overlook could not be processed further.

This Court has found that the purchase of Doves Overlook constitutes regulatory conduct by the defendant, and since that did not occur until, at the earliest, the consent decree on October 5, 1993, the filing of this complaint for declaratory judgment in April 1994 was well within the statute of limitations

Finally we must address the key issue, and that is whether the regulatory conduct of the County causes a taking or damage to the plaintiff that is compensable under the federal and state laws.

As I said, this analysis is the determination first whether the regulation goes too far by: A, causing the owner to suffer physical invasion of the property right at issue: or B, denying the owner all economically beneficial use of its land.

This Court finds that while there is no physical invasion of property right by the purchase of the County of Doves Overlook, that purchase did deny Omni of all economical beneficial use of the land as set forth in my factual analysis. This would make the taking a categorical taking and end the inquiry. But this Court would also point out in the alternative that even if we assume that there was not a taking, or total taking of all, emphasis on all, of the economically viable uses of the land, we may also engage in an ad hoc inquiry as noted in the legal analysis above.

As the Court said in the Ruckelshaus case, while there is no set formula for determining when justice and fairness requires that economic injuries caused by public action must be deemed a compensable taking, the inquiry into whether a taking has occurred is essentially an ad hoc factual inquiry. Several factors should be taken into account in determining whether the governmental action has gone beyond regulation and effects the taking. Among them are; one, the character of the government

action; two, its economic impact; and three, its interference with reasonable investment-backed expectations.

It should be pointed out that these factors issues cited in the Ruckelshaus case may be taken into account, but do not constitute some sort of three-part test that mandates that the plaintiff must satisfy all three tests in order to prevail. Let's review those considerations though as the Court suggested.

One; the character of the governmental action. This is a unique feature of this case, as I've said before. The delay in the plan approval process did not deprive Omni of the use of its property at an R-10 density along with Doves Overlook; it was, in fact, the purchase of the property that did that. As I said, this would create a chilling effect and a chilling effect on any developer, that is any prudent real estate developer, who would discover the same government that regulates how and when you may use your property subject to certain legal constraints now uses the awesome power of the tax payer to purchase the adjoining property.

One of the legal constraints under which the government operates is the taking clause of the constitution, both federal and state. The expressed effect, of course, of a government that not only regulates subdivision but also gets directly involved in the ball game, if not the expressed purpose would be the blocking of development and the use of the land. No wonder every developer in this case testified to being shocked by the County's conduct. While a tax payer may wonder what business a cost conscious county has in paying $3.7 million of tax payers money to purchase 405 residential building lots that its own staff has said should not be developed as R-10 and while a real estate developer might see in this County's conduct an arrogant display or abuse

of power to block the legitimate development of private property, the validity of the purchase is for legislative and not judicial determination.

In addition, this plaintiff has not pled the inverse condemnation of Doves Overlook. The purpose of the purchase is not the plaintiff's complaint, only the effect of that purchase: except, I would add, as the purpose of that purchase impacts on the benefits and burdens test and review.

Number 2, economic impact of the regulation. Here there was clearly a denial of economically viable use of the property as a result of the purchase of Doves Overlook by the County. From Omni's point of view, there was a take of all economically viable use of the property which would make this a categorical damage under the Lucas case. But even if we assume, for the purpose of this inquiry, that there was only partial damage of Omni's interest, the Florida Rock case would still permit recovery. The economic impact, as stated before, must be measured not on when Omni first purchased the property, but at the time the regulatory conduct, that is to say, when the County purchased Doves Overlook and terminated Omni's initial submission.

Every expert has testified, including Mr. Kelsey from the County, that at that precise moment in time the value of Omni's property was substantially diminished, and the sole reason it was diminished was that Omni was no longer able to development its property as an R-10 density by using Doves Overlook, the only economically feasible or viable way to do so. And that, as I say, is by using Doves Overlook. While diminishment in value alone is neither a compensable take nor a damage, it surely is a method of analyzing the impact of the County's conduct on this property and on this property

owner. And if the property owner can satisfy the other tests then it is relevant for the purpose of the consideration of damages.

Three. The regulatory conduct constitutes interference with the reasonable investment-backed expectations. The property owner had distinct investment-backed expectations. As in the Loveladies case, Omni purchased the land involved with a

reasonable expectation and intention for developing it over time for the sale to purchasers of the improved lots, or for an outright sale as property with an R-10 use. And the regulatory conduct constituted an interference with their investment-backed expectations that cannot be denied. Interference Of reasonable investment-backed expectations are clearly more than mere infringement of the owner's personal pleasure and enjoyment, and are than merely rendering private less desirable for certain purposes, or even causing personal annoyance or discomforts in its use as stated under the Virginia law in the Lambert case.

But the evidence in this case is that Omni's expectations from the time it purchased the property, after an extended feasibility study period, and its initial submission of plans, to the time DLA prevailed in Court, were more than just a speculative calculation. They had a reasonable investment-backed expectation based on a legal conclusion upheld by the Courts, and they spent thousands of dollars to perfect those expectations.

Again, the relevant time to measure those expectations is the moment the County stepped in and agreed to buy Doves Overlook. At that time Omni completed its feasibility study. It had submitted its plan years earlier. It had then paid the price for the land based on the R-10 value. It had proceeded timely with four separate submissions of its plans. It had filed several

lawsuits to force the County to proceed with the plan. And it had watched as DLA did the same. In fact, it virtually mirrored DLA's image in the planning process because it was functionally and economically dependent on that plan.

And just when it had every reason to believe that its efforts would pay off, just when DLA had established its legal rights and thereby Omni's legal rights to proceed with the plan, and just as the County had given in and the planning commission had approved DLA's preliminary plan, and had accepted its submission of the final plan, Omni clearly had abundant reason to believe that its investment-backed expectations were reasonable and accurate and to expect the County to approve the plans for Doves Landing. This was clearly more than mere speculation.

A review of the analysis presented in the Loveladies Harbor Case brings us to the same findings. First there was a denial of all economically viable uses for the property as a result of the regulatory imposition, or even if we assume it was a partial taking it was still confiscatory under the facts of this case. The second, that Omni had distinct and reasonable investment-backed expectations that were interfered with by the conduct of the County. The third inquiry is more difficult, and it brings us to our analysis of this case under the Virginia law.

The third category is whether there was an interest vested in the owner as a matter of state property law and not within the power of the state to regulate under the common law of nuisance. Both counsel have agreed that this inquiry is not applicable to this case because it does not involve a taking by the County of Omni's property under the guise of governmental authority of the nuisance law. This is correct, but it does

shape the inquiry that the Court must make. If the property interests alleged have been damaged or taken under our consideration of the state law, because it calls for a balancing of the authority of the government to justify its action with the impact of that action on the property rights of the owner, inherent to the title of the property. It's clear that in this case the County cannot justify its conduct on any doctrine of nuisance.

This then leads us to our second inquiry under Virginia state law, as noted by both counsel, and my analysis of the Virginia law, the Virginia law has really two different but related tests for the takings clause; one for takings, and one for damage. The Court must first consider whether the regulation at issue has the effect of taking all economically viable use of the property, or all use of the right to sell. The County's position, that Virginia would take the dissent view in the Florida Rock case I think the Court finds is correct. But as noted before, this Court finds that in fact the conduct of the County has deprived Omni of all economical viable use of the property. On the other hand, even if we assume that the County is correct, and that there are economically viable uses available to Omni at the time the County purchased Doves Overlook, while it is still true that there has been no taking under Virginia law, we may still consider whether or not there's been a damage to the property.

Under Virginia law this inquiry is whether there has been proof of direct and specific invasion of either one, the corpus, or two, an appurtenant right connected therewith. Clearly just as there been no physical invasion of the property there's been no damage of the corpus. That leads us to the key issue in this case; whether or not there has been a damage to an appurtenant right connected with Omni's property.

The County has framed the issue as follows: One, is the property right at issue vested in the owner by virtue of the state property law. Omni contends that the right at. issue is the right of Omni to use its property to the density permitted in the R-10 zone. The County argues that while Omni has the right to use its property and the right to use it to the density permitted in the R-10 zone. subject to the appropriate approval process, it has no right to do so using the adjoining property. It has no contract right with DLA, no easements and no property rights to develop Doves Landing by way of Doves Overlook.

The only thing the County has done, argues the County. is to take away Omni's right to use Doves Overlook in developing Doves Landing, and Omni has no vested. "use of right"in Doves Overlook.

According to the County the action of the County leaves Omni with the same rights it had when it purchased the land, because it had no right to use Doves Overlook. But the County is incorrect in their view. I think they provided a limited scope of plaintiff's property rights. and they ignored the effect of the defendant's conduct on the subject property.

The right at issue is the right of Omni to use its property, and to do so at a density permitted under the R-10 zone. Omni had no right to compel Doves Overlook to supply either access or water and sewer to Doves Landing; but the effect of the County's purchasing the adjoining property is that it leaves Omni with no economically viable use of Doves Landing. At least from the time of the consent decree to this date Omni has made no alternative use, and the County was well aware of the available uses when it purchased Doves Overlook and made no provision for Doves Landing.

To deprive Omni of its right to proceed is to say to David Lucas, that while the State of South Carolina, or the local county, cannot pass a beach management regulation that will deprive you of all economically viable uses of your property so that you cannot build a dwelling house on your property, the state can purchase the adjoining property over which the only available economic use can now be enjoyed. The end results are the same. The County has down-zoned Omni's property when it could not legally do so through the subdivision process.

Of all the bundle of rights that a land owner has one of the most important is the right to use his property. While every property owner must submit that use to the good of the community by being subject to government regulation of that use, where that government regulation goes too far it may constitute a compensatory taking under the state and federal constitutions.

The County had granted Omni the right to use its property in an R-10 density, always subject to the regulations authorized by 15.l-465 et seq., the land subdivision and development. These regulations included the need for access to a state maintained road and public sewer and water in order to use the property as R-10.

Omni could only use its property as an R-10 development in two ways; and by the time the County purchased Doves Overlook only one of those was economically feasible: through Doves Overlook.

In the end then, after consideration of the totality of the circumstances, the federal and state law, and especially when guided by principals of equity, this Court concludes that justice and fairness require that economic damages caused by such public action must be deemed a compensable taking or damage.

The only other comment I will add is on damages. the plaintiff had asked for an injunctive relief and damages. And I will say that the Court has considered that request and feels that it is an inappropriate request under the circumstances of this case.

VIRGINIA:

IN THE CIRCUIT COURT FOR PRINCE WILLIAM COUNTY

OMNI HOMES, INC.

Plaintiff.

In Chancery No. 36345

V.

BOARD OF SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA, et al.

Defendants.

FINAL DECREE

This cause was heard by the Court on October 16, 17, 18, 23, 24, 25, 26, and 30, 1995. After considering the testimony of the witnesses, the arguments of counsel, the exhibits and the applicable law, for the reasons stated from the bench on November 1, 1995, including attached corrected partial transcript, it is

DECREED, that Plaintiff is entitled to payment of just compensation ftom the Defendant for the Defendant's taking and damaging of Plaintiff's property, and it is further

DECREED, that Plaintiff is therefore awarded damages against the Defendant in the amount of Eight Hundred Fifty Thousand Dollars ($850,000.00) plus interest at the judgment rate of interest from November 1, 1995.

Entered this 8th day of December, 1995.

Judge Richard B. Potter

BOARD OF SUPERVISORS OF PRINCE WILLIAM COUNTY

vs.

OMNI HOMES, INC.

OMNI HOMES, INC. v. BOARD OF SUPERVISORS OF PRINCE WILLIAM COUNTY

Record No. 960508, Record No. 960471
SUPREME COURT OF VIRGINIA
253 Va. 59, ___ S.E.2d ___, 1997 Va. LEXIS 11 (1997)
January 10, 1997, Decided

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY. Richard B. Potter, Judge.

JUDGES

Present: All the Justices. OPINION BY JUSTICE ELIZABETH B. LACY.
AUTHOR: LACY

OPINION

OPINION BY JUSTICE ELIZABETH B. LACY

In this appeal, we consider a property owner's claim that government action constituted an uncompensated taking of property in violation of the Fifth Amendment of the United States Constitution or Article I, § 11 of the Constitution of Virginia.

In 1986, Omni Homes, Inc. (Omni) executed a contract to purchase a 72.68-acre parcel of unimproved land located in Prince William County and, in 1989,

bought the parcel for $ 436,091. The property was zoned R-10, urban residential development, and Omni proposed to develop the land as Doves Landing subdivision with 106 residential lots. The property was located adjacent to an undeveloped 188-acre parcel owned by Doves Landing Associates (DLA). DLA planned to develop its property as Doves Overlook subdivision with approximately 405 residential lots.

Development of Doves Landing as a subdivision required securing certain road and utility access. The property was three miles from public water and sewer access, and the only access to a public road was over a gravel road called Doves Lane. To obtain adequate access to the public road, Omni could purchase additional easements along Doves Lane from adjoining property owners and upgrade the road, or it could design a new road through Doves Overlook. Similarly, Omni could secure access to the needed utilities by paying the full three-mile extension costs or could agree to share the cost of the utility extension with DLA, the owner of Doves Overlook. Omni decided to base its R-10 development plan on providing road, sewer, and water access through and in conjunction with Doves Overlook and its owner.

DLA and Omni had an informal understanding that if Doves Overlook was developed as an R-10 subdivision, DLA would permit Omni to "piggyback" on its plans so that the road access and public sewer and water could run through Doves Overlook and into Doves Landing. Omni and DLA also "agreed to agree later" that they would enter into a cost-sharing agreement in which Omni would pay its pro rata share of the road and utility extension cost on a per lot basis. However, there was no written agreement between Omni and DLA to this effect, and Omni did not have any easements or

other property interests in Doves Overlook that would permit it to construct the infrastructure through Doves Overlook. DLA submitted its preliminary subdivision plan for Doves Overlook in October 1987. In the opinion of the County, the plan proposed a public facility which was inconsistent with the County's Comprehensive Plan, and necessitated a review under Code § 15.1-456. The County's position led to a series of appeals, culminating in a determination by the Circuit Court of Prince William County that such review was not necessary. This Court refused the County's petition for appeal on January 9, 1990. Doves Overlook's preliminary plan was approved on February 7, 1990.

Meanwhile, in January 1988, Omni submitted its preliminary subdivision plan for Doves Landing to the County for approval. On January 12, 1988, the County told Omni that its plan did not meet minimum requirements because it did not show access to a public road through Doves Overlook. The County also informed Omni of the litigation involving DLA's subdivision plan for Doves Overlook. Omni proceeded with its plans, completing its contract to purchase the Doves Landing parcel in January 1989, and re-filing its subdivision plan in April 1989. The County returned the plan in May, suggesting that it was premature until the appeals surrounding DLA's subdivision plan for Doves Overlook were resolved. Omni sued the County to force it to process Omni's plan. That litigation was settled by an agreement that the County would process the plan, but no approval would be given until the conclusion of the litigation between DLA and the County.

The County informed Omni in June 1990, that the Doves Landing preliminary plan could not be presented to the planning commission until access to the public

road was secured by an approved, bonded road through Doves Overlook. The Doves Overlook plan did not show such a road. Omni acknowledged the requirement and the County agreed to hold the plan open.

In November 1990, the County adopted regulations required for implementation of the Chesapeake Bay Preservation Act. Code §§ 10.1-2100 through -2116. These regulations affected Doves Overlook, and DLA sued the County for inverse condemnation. That litigation was settled by a consent decree entered on October 6, 1993, in which the County paid DLA $ 3.7 million for Doves Overlook under a three-year lease/purchase agreement.

On April 4, 1994, Omni filed the instant litigation alleging that the County's various actions amounted to a taking of Omni's property without compensation in violation of the Fifth Amendment to the United States Constitution (Fifth Amendment), 42 U.S.C. § 1983, and Art. I, § 11 of the Constitution of Virginia (Art. I, § 11). Following an ore tenus hearing, the trial court determined that the purchase of Doves Overlook by the County qualified as regulatory action and constituted a compensable taking or damaging of Omni's property for purposes of the Fifth Amendment and Art. I, § 11. The trial court entered an order requiring the County to pay Omni $ 850,000. The trial court denied Omni's request for attorneys' fees and dismissed Omni's claim under 42 U.S.C. § 1983 on ripeness grounds. The County and Omni filed separate appeals challenging a number of the trial court's rulings. We awarded both appeals and combined them for argument and disposition here.

Omni argues, and the trial court held, that the property interest in issue was Omni's right "to use its property, and to do so at a density permitted under the

R-10 zone."[1] The trial court determined that, at the time the County purchased Doves Overlook, development of Doves Landing by using Doves Overlook for road, water, and sewer access was the only remaining economically viable use of Omni's land. Consequently, the County's purchase of Doves Overlook, according to the trial court, caused Omni to lose all economically viable uses of its property. Thus, the trial court held that the County's action was an uncompensated taking in violation of the Fifth Amendment and Art. I, § 11.

The trial court also held that, even if the County's action did not preclude all economically viable uses, an uncompensated taking occurred under both the federal and state constitutions. The trial court found that the economic impact of the County's actions on Doves Landing went beyond mere diminution of the value of the land and that Omni's reasonable investment-backed expectations were frustrated by the County's action. Finally, the trial court held that Omni suffered damage, as that term is used in Art. I, § 11, because the right to develop Doves Landing as an R-10 subdivision was a right appurtenant to the land, and the County's purchase of Doves Overlook directly and specially decreased the value of Omni's property.

Principles of appellate review require that the judgment of the trial court be upheld unless it is plainly wrong or without evidence to support it. *Carter v. Carter*, 223 Va. 505, 508-09, 291 S.E.2d 218, 220 (1982). However, we are not bound by the trial court's view of the law. *See City of Richmond v. Braxton*, 230 Va. 161, 163-64, 335 S.E.2d 259, 261 (1985). In this case, the trial court erred in its interpretation of the relevant legal standards used to determine whether property has been taken under the federal and state constitutions. Applying

these standards, we conclude that the facts do not support a finding of a compensable taking or damage under either the federal or state constitutions and, accordingly, we will reverse the judgment of the trial court. We first review Omni's Fifth Amendment claim.

FIFTH AMENDMENT

The Fifth Amendment prohibits the government from taking private property for public use without just compensation. Until 1992, the United States Supreme Court had enunciated various criteria to be applied by the courts in considering whether a compensable taking had occurred. These criteria did not provide a bright line test but required courts to engage in a case-by-case, ad hoc analysis. *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 898 (1995). A compensable taking occurred if government regulation went "too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922), based on consideration of: (1) the character of the government's action; (2) the economic impact of the regulation on the claimant; and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *Penn Cen. Transp. Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).

In 1992, Justice Scalia, writing for the majority in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), explained that this "case-specific inquiry" is not necessary when the government physically takes possession of property or regulatory action deprives property of "all economically beneficial or productive use." *Id.* at 1015. Such governmental action goes "too far" and constitutes a

categorical taking for purposes of the Fifth Amendment. *Id.* at 1015, 1019.

The Court in *Lucas* also set out a new test for determining whether a take is compensable, even in categorical takings: if the "owner's estate shows that the proscribed use interests were not part of his title to begin with," the owner is not entitled to compensation. *Id.* at 1027. Stated another way, the limitation imposed by the government which constitutes the taking "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. The regulation must "do no more than duplicate the result that could have been achieved in the courts - by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." *Id.*

The facts in *Lucas* involved a categorical taking and thus did not require further discussion of whether regulatory action which results in less than a per se or categorical taking can be a compensable taking. Nothing in Lucas, however, indicated an intent to limit compensable takings under the Fifth Amendment to such instances. Courts considering the issue since Lucas have continued to resolve Fifth Amendment claims involving less than a categorical taking of property by utilizing the traditional three-part test. *See e.g., Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 643-47, 124 L. Ed. 2d 539, 113 S. Ct. 2264 (1993); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1123 (4th Cir. 1995); *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994);

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994).

A.

In this case, the trial court first determined that the action of the County in purchasing Doves Overlook was a categorical taking as described in *Lucas* because it resulted in denying Omni all economic use of its property.

In reaching this conclusion, the trial court limited its consideration of the property's uses to those uses considered economically viable by Omni. Acknowledging that the property could be developed without using Doves Overlook either at the R-10 density, if Omni paid the full cost of the off-site roads and utility access, or at a lesser density, the trial court nevertheless concluded that neither of these plans was "economically feasible for Omni," because "by the time the County purchased Doves Overlook Omni had expended thousands of dollars to engineer, plan and develop the property, as well as attorney fees in litigation."

The constitutional inquiry, however, is not whether the remaining uses are economically feasible *to the owner*. The loss of the ability to develop or use the land as originally intended is not a categorical taking if another economic use for the land is available, even if the value of the use is less than the value attached to the owner's desired use. *Andrus v. Allard*, 444 U.S. 51, 64-67, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979); *Goldblatt v. Hempstead*, 369 U.S. 590, 593-94, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962). Thus, action which limits the ability to develop or use land as originally intended or in a manner producing the largest return on investment does not qualify as a categorical taking if another economic use for

the land is available. The proper inquiry is whether the action complained of stripped the land of all economic uses. *Lucas*, 505 U.S. at 1015; *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1172 (Fed. Cir.), *cert. denied*, 502 U.S. 952, 116 L. Ed. 2d 354, 112 S. Ct. 406 (1991).

When the proper standard for determining whether there was a categorical taking of property under the Fifth Amendment is applied, it is evident that no such taking occurred in this case. The property was originally purchased for $ 436,000, or approximately $ 6,000 per acre. The value of the land after the County's purchase of Doves Overlook, according to the appraisal relied on by the trial court, was $ 4,200 to $ 5,000 an acre, based on comparable sales of lots consisting of approximately ten acres each. There was no evidence of a lack of market for such lots. The trial court itself recognized that the property could be developed in this manner. Therefore, the County's purchase of Doves Overlook did not deprive Doves Landing of all economic or beneficial use and did not constitute a categorical taking of Omni's property.

B.

Similarly, the trial court erred in its alternate holding that a Fifth Amendment violation occurred even if the County's action did not eliminate all economic use of the property. In reaching this conclusion, the trial court considered the criteria traditionally applied prior to *Lucas* - character of the government's action, economic impact of the action, and frustration of investment-backed expectations.

We begin with the trial court's analysis of the investment-backed expectations frustrated by the County's action. While this criterion embraces a number

of factors, a primary purpose is to ensure that owners seeking compensation for an alleged taking "bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Loveladies*, 28 F.3d at 1177; *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1009-10, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 226-27, 89 L. Ed. 2d 166, 106 S. Ct. 1018 (1986); Robert M. Washburn, "Reasonable Investment-Backed Expectations" as a Factor in Defining Property Interest, 49 *Wash. U.J. Urb. & Contemp. L.* 63, 76 (1996).

The trial court described Omni's investment-backed expectation as purchasing Doves Landing with the expectation that it could be developed at an R-10 density. This expectation was not speculative, the trial court concluded, because Omni's feasibility studies showed such development was possible, the zoning was in place, plans had been submitted, "DLA had established its legal rights and thereby Omni's legal right to proceed with the plan," and DLA's preliminary plan had been approved. Thus, the trial court concluded, "Omni clearly had abundant reason to believe that its investment-backed expectations were reasonable and accurate and to expect the County to approve the plans for Doves Landing."

What the trial court failed to consider in its description of Omni's expectations was that the "state of affairs" relative to R-10 development of Doves Landing at all times included the requirement of adequate road and utility access. Omni was always aware of this requirement. Securing this access was not an *expectation* under the "state of affairs" but a *risk* which Omni was aware of and accepted when it purchased Doves Landing.[2] Omni's hope or optimism that it could secure

the required access cannot transform a risk of development into an investment-backed expectation supported by the "state of [regulatory] affairs" at the time of purchase. One who buys with knowledge of a restraint must assume the risk of economic loss. *Loveladies*, 28 F.3d at 1177; *Creppel*, 41 F.3d at 632. "A party may not undertake a calculated business risk and then seek reimbursement from the Government when the party's gamble does not result in its favor." *Atlas Enters. Ltd. Partnership v. United States*, 32 Fed. Cl. 704, 708 (1995).

Omni's gamble here went beyond merely securing road and utility access. Omni's proposed development depended on such access coming through Doves Overlook. There was no assurance that such access would be available. Omni's ownership of Doves Landing did not carry with it any right or assurance that Omni could utilize access through Doves Overlook. There were no easements or contracts giving Omni road or utility access through or with Doves Overlook. At best, Omni and DLA had an "agreement to agree" at some future time regarding the access issues. There is no evidence in the record that any of the money Omni invested in Doves Landing was spent to secure the needed access. Had DLA sold Doves Overlook to a party other than the County, Omni would be in the same position in which it finds itself now: having an R-10 development plan and hoping to secure the required road and utility access through and together with Doves Overlook.[3] Omni was always dependant on the willingness of the owner of Doves Overlook to accommodate its development plan.

The trial court erred to the extent that it considered Omni's ability to achieve the required access through Doves Overlook as a reasonable investment-

backed expectation. The trial court further erred in omitting consideration of the risk of securing road and utility access when analyzing Omni's investment-backed expectation in R-10 development of the property. Taking these matters into consideration, we conclude that the "state of affairs" upon which Omni relied when it purchased Doves Landing included the risk of not securing adequate road and utility access. The County's purchase of Doves Overlook did not impose this risk, did not change the requirements for R-10 development, and did not interfere with or frustrate any enforceable arrangement or right Omni had regarding road or utility access. Therefore, Omni's investment-backed expectation in R-10 development does not support a claim for a compensable taking of property under the Fifth Amendment.

The access requirement for R-10 development is also relevant to consideration of the economic impact of the County's action. This criterion is measured by the difference between the fair market value of land before and after the alleged take. *Florida Rock*, 18 F.3d at 1563. The trial court characterized the economic impact of the County's purchase as a significant diminution of the property's value. Although the trial court reached this conclusion by considering the change in the property's fair market value, its finding was based on a pre-purchase value which assumed the existence of access rights through Doves Overlook.

The appraisal report relied on by the trial court placed the pre-purchase value of Doves Landing at $ 1.2 million "assuming the functional unity" of Doves Overlook and Doves Landing. The "functional unity," or access through Doves Overlook, was always a contingency, not a right attached to Doves Landing or a

right which could be enforced by Omni. To base a property value on a factor which is required to develop the property, but which never existed in fact or in law, distorts the fair market value analysis in this case.

The economic impact of the County's action must be measured without regard to the illusory "functional unity" between the two parcels. The value of the property absent "functional unity" prior to the County's purchase of Doves Overlook was set at $ 436,000, the 1989 purchase price, and at $ 450,000, based on an April 11, 1989 assessment, which was reaffirmed on March 6, 1991. The fair market value immediately following the County's purchase without the "functional unity" was $ 350,000. The economic impact, therefore, was at most a decrease of $ 100,000 in value, or somewhat less than one-third of the fair market value of the property prior to the County's purchase of Doves Overlook.

No single criterion or combination of criteria is dispositive in a Fifth Amendment taking analysis. *See Lucas*, 505 U.S. at 1071; *Hodel v. Irving*, 481 U.S. 704, 714-16, 95 L. Ed. 2d 668, 107 S. Ct. 2076 (1987). Here, we conclude that the trial court erred in its identification of relevant investment-backed expectations and in the factors it considered in determining the economic impact of the County's purchase of Doves Overlook on Doves Landing. When viewed properly, we find that Omni's expectation of using Doves Overlook to develop Doves Landing did not qualify as an investment-backed expectation, as that term is used in an analysis under the Fifth Amendment, and that the economic impact of the County's action was not one of significant diminution in value. In this case, based on the conclusions we have reached on two criteria, we believe it unnecessary to consider the third criterion, the character of the County's

action, because regardless of the legality or merit of the County's action, Omni did not establish a regulatory taking of Omni's property under the Fifth Amendment.[4]

ARTICLE I, § 11 OF THE CONSTITUTION OF VIRGINIA

Article I, § 11 prohibits the government from taking or damaging private property for public uses without just compensation. Code § 15.1-276 defines the constitutional term "public uses" to embrace "all uses which are necessary for public purposes." Property is considered taken for constitutional purposes if the government's action deprives the property of all economic use. *City of Virginia Beach v. Virginia Land Inv. Ass'n No. 1*, 239 Va. 412, 416-17, 389 S.E.2d 312, 314 (1990).

As we have previously discussed, the purchase of Doves Overlook by the County did not eliminate all economic uses of Doves Landing. Therefore, the County's action did not constitute a taking of Omni's property under Art. I, § 11. *Id.*

Property is damaged for Virginia constitutional purposes when an appurtenant right connected with the property is directly and specially affected by a public use and that use inflicts a direct and special injury on the property which diminishes its value. *City of Lynchburg v. Peters*, 156 Va. 40, 49, 157 S.E. 769, 772 (1931). Virginia law holds partial diminution in the value of property compensable only if it results from dislocation of a specific right contained in the property owner's bundle of property rights. *Lambert v. City of Norfolk*, 108 Va. 259, 268, 61 S.E. 776, 778-79 (1908).

Omni argues, and the trial court held, that the right to develop one's property is an "appurtenant right

connected to the property" and that such right was directly and specially affected by the County's actions resulting in the loss of the "only viable economic use of the property." However, Omni has not lost the right to develop its property. The R-10 density classification has not been altered. Omni seeks to transform a risk attached to the development of its land at R-10 density into a right to do so. As discussed above, Omni had not acquired the rights necessary to realize its preferred method of development either as a matter of contract or easement. There was no right appurtenant to Doves Landing which would allow Omni to develop it with and through Doves Overlook. The action of the County in purchasing Doves Overlook could not damage a non-existent right. Accordingly, we conclude that the County's purchase of Doves Overlook did not damage Omni's property within the contemplation of Art. I, § 11.

For these reasons we will reverse the judgment of the trial court and enter judgment in favor of the County in Record No. 960508 .[5] In light of this holding, we will dismiss Omni's separate appeal, Record No. 960471, challenging the trial court's disposition of its claims under 42 U.S.C. § 1983 and for attorneys' fees because it is moot.

Record No. 960508 - Reversed and final judgment.
Record No. 960471 - Dismissed.

DISPOSITION

Record No. 960508 - Reversed and final judgment.
Record No. 960471 - Dismissed.

OPINION FOOTNOTES

1 The parties disagree over the property right at issue in this case. The County asserts that the interest affected by its purchase of Doves Overlook was Omni's ability or right to develop its property with and through Doves Overlook. Resolution of these conflicting views is unnecessary in light of our disposition of the case. For purposes of this opinion, we utilize the trial court's description of the right at issue.

2 Testimony at trial indicated the price paid for Doves Landing was low for R-10 land, reflecting the need "to do things" including acquiring the access rights.

3 Reasonable investment-backed expectations are also subject to the government's power to reasonably regulate for the public interest. *Lucas*, 505 U.S. at 1023; *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1033 (3d Cir.), *cert. denied*, 482 U.S. 906, 96 L. Ed. 2d 375, 107 S. Ct. 2482, *reh'g denied*, 483 U.S. 1040, 97 L. Ed. 2d 800, 108 S. Ct. 10 (1987). In the absence of a vested interest, Omni was not entitled to rely on continued R-10 zoning of its own property or Doves Overlook. *Snow v. Amherst County*, 248 Va. 404, 408, 448 S.E.2d 606, 608-09 (1994); *Vienna Council v. Kohler*, 218 Va. 966, 976, 244 S.E.2d 542, 548 (1978). Regulatory action required by the Chesapeake Bay Act affected the Doves Overlook property and ultimately resulted in the change of ownership from DLA to the County.

4 Omni claimed a total loss of the economic use of its property or alternatively a constitutionally significant economic loss of its total property. Thus, we do not

address whether the total loss of "one of the sticks" in the bundle of property rights qualifies as a compensable taking under the Fifth Amendment. *Lucas*, 505 U.S. at 1016 n.7. *Compare Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987) and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922); *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 898 (1995); and *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995).

5 Our disposition of the case makes consideration of the County's assignments of error regarding whether the County's purchase qualified as regulatory action and Omni's retention of the fee interest in Doves Landing unnecessary.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 28th *day of* February, 1997.

Omni Homes, Inc., Appellant,

against Record No. 960471 Circuit Court No. 36345

Board of Supervisors of
Prince William County, Appellee.

Board of Supervisors of
Prince William County, Appellant

against Record No. 960508 Circuit Court No. 36345

Omni Homes, Inc., Appellee.

Upon a Petition for Rehearing

On consideration of the petition of Omni Homes, Inc. to set aside the judgments rendered herein on the 10th day of January, 1997 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste: David B. Beach
Clerk

(2)

Supreme Court, U.S.
FILED
JUN 26 1997
CLERK

Record No. 96-1878

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

OMNI HOMES, INC.
Petitioner,

vs.

BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to grant a Writ of Certiorari to consider a "regulatory partial taking" theory that was neither raised nor addressed below?

2. Does this Court have jurisdiction to grant a Writ of Certiorari to render an advisory decision reversing its rulings that there is no such thing as a "regulatory partial taking"?

3. Should this Court exercise its discretion to grant a Writ of Certiorari solely to consider whether the Supreme Court of Virginia misapplied the reasonable investment-backed expectation rule, which rule the Supreme Court of Virginia stated correctly below?

4. Should this Court exercise its discretion to grant a writ of certiorari when the decision of the Supreme Court of Virginia does not conflict with this Court, another state court of last resort or a United States court of appeals?

5. Was the Supreme Court of Virginia plainly wrong in rejecting Omni's regulatory taking claim where Omni was not deprived of any land use interest in its property?

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Omni's statement of the opinions below omits citation to unofficial reports in contradiction of Rule 14(1)(d). The full citation, including the unofficial report, is *Board of County Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 481 S.E.2d 460 (1997) (Record No. 960508).

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). Omni's first two Questions Presented are based on a legal theory never presented to or addressed by the Virginia courts. Further, Omni's failure to prove that County regulation deprived it of *even one* land use interest in its property renders advisory any decision on Omni's first two Questions Presented. Omni's third Question Presented also does not state a basis for this Court's discretionary exercise of jurisdiction under Rule 10; it asks only whether the Supreme Court of Virginia's decision was erroneous or misapplied the properly-stated, "reasonable investment-backed expectation" prong of the ad hoc, regulatory taking analysis.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves application of the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This was a regulatory taking case under the Just Compensation Clause of the Fifth Amendment.[1] The issue was whether the County violated that clause by purchasing land in which Omni *did not* possess a property or contract right. The trial court held that the County's purchase of this separate and separately-owned property constituted a regulatory taking of Omni's property. The Supreme Court of Virginia reversed, concluding that "the facts do not support a finding of a compensable taking or damage under either the federal or state constitutions." A-35[2] (253 Va. at 66, 481 S.E.2d at 463).

In this case, the alleged land use interest was Omni's desire to develop its property ("Doves Landing") as an R-10

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[1] In its statement of the case, Omni refers to claims of due process and equal protection; however, Omni elected not to pursue those claims at trial and the trial court's lengthy bench ruling contains no analysis or conclusions of law as to them. *See* A-2 through A-33. Omni noted no exception to this omission and did not appeal any failure of the trial court of declare violations of due process or equal protection. The only Constitutional claim at issue was whether there was a regulatory taking under the Just Compensation Clause of the Fifth Amendment. A-14; A-35, A-40 (253 Va. 63, 66, 481 S.E.2d 461, 463).

[2] The citation "A-__" is to the appendix attached to Omni's Petition.

subdivision[3] in conjunction with the adjacent property. Omni elected to pursue this sort of development instead of developing its property independently.[4] Omni also elected to design its development with public road access needed for R-10 development coming through the adjacent property ("Doves Overlook") instead of upgrading the existing public road ("Doves Lane"). The trial court held that, given this dependency, the County took Doves Landing by regulation when it purchased Doves Overlook. A-31 through A-32. Curiously, admissions at trial established that Omni never even *asked* the County to grant it easements for water, sewer and roads across Doves Overlook from the time the County became the owner of Doves Overlook. JA[5] 1504 A-C, 1505-

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[3] R-10 development refers to single-family residential development at a maximum density of four (4) units to the acre.

[4] Both the trial court and the Supreme Court of Virginia found that Omni had alternative, economically-viable uses available to it at the time it purchased Doves Landing. A-9, A-43. The Supreme Court of Virginia held that the trial court erroneously discounted these alternative uses based on the money Omni had spent in pursuit of unsecured joint R-10 development with Doves Overlook by the time the County purchased Doves Overlook. A-42 through A-43 (253 Va. at 68, 481 S.E.2d at 464).

[5] The Joint Appendix used below will be cited herein as "JA___". Respondent understands that the Joint Appendix is not before the Court now, but includes these references in the event the Court is inclined to address any of the discrepancies in factual statements.

08, 2693-98, Admissions 1, 3, 12. In any event, the Supreme Court of Virginia reversed, holding that not securing the needed road and utility access was "a *risk* which Omni was aware of and accepted when it purchased Doves Landing." A-44 (253 Va. at 69, 481 S.E.2d at 465). (Emphasis in original).

Omni's Statement of the Case is mostly erroneous. It mischaracterizes the trial court's findings and the evidence, and it does so without reference to the Joint Appendix used below. In the way of correction, the County incorporates in this Statement of the Case the facts set forth in the opinion below[6] and urges the Court to adopt them in lieu of those alleged in Omni's Petition. The County directs the Court's specific attention to pages A-36 through A-37[7], where the Supreme Court of Virginia observed that:

(1) Omni needed to secure road and utility access before it could develop its property as an R-10 development;

(2) Omni had more than one alternative in securing that access;

(3) Omni "decided to base its R-10 development plan on providing road, sewer and water access through and in conjunction with Doves Overlook and its owner"; and

(4) Omni did not possess either a written agreement[8] or "any easements or other property interests in Doves Overlook that

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[6] A-35 through A-38 (253 Va. 63-64, 481 S.E.2d 461-62).

[7] 253 Va. at 63, 481 S.E.2d at 461-62.

[8] The trial court found that "Omni clearly did not have a contract right to use Doves Landing through Doves Overlook, nor could it compel DLA [the owner of Doves Overlook] to grant any such right." A-5.

would permit it to construct the infrastructure through Doves Overlook."

As found by the trial court, R-10 development in conjunction with Doves Overlook was "always conditional because it was conditioned on the owner of Doves Overlook obtaining prior approval for that property, and in fact, agreeing to the cost sharing scheme and on meeting the usual requirements of subdivision development found in the County Ordinances as authorized by Virginia Code Section 15.1-465, et seq." A-7. It is incorrect for Omni to state, therefore, that the County's purchase of Doves Overlook deprived Omni of a land use *right* to so develop Doves Landing in the R-10 zoning district. That land use interest was always dependent upon DLA's good graces and cooperation of the owner of Doves Overlook ("DLA"), *not upon any County permit.*

It is also incorrect for Omni to say, as it does on page 3 of the Petition, that the trial court found a "multitude of sins" to have caused a compensable regulatory taking of Doves Landing. The trial court never used Omni's self-serving term. *See* A-2 through A-33. Further, the trial court specifically found that there were only two types of regulatory conduct at issue, one being "delay in the development process for Doves Landing" and the other being "the purchase of Doves Overlook by the County." A-23. Of these two types of putative regulation[9], the trial court found causative *only* the County's purchase of Doves Overlook; in the same breath, the

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[9] The County appealed the trial court's finding that the purchase of one parcel of property constituted regulation of another. This question was not reached below. *See* A-51, n. 5 (253 Va. at 73, n. 5, 481 S.E.2d at 467, n. 5).

trial court found that delay in the development process for Doves Landing did *not* deprive Omni of the right it alleged to have lost. A-26. *See also* A-31.

Omni's Statement of the Case also omits the other findings of the trial court concerning delay in subdivision plan approval, namely:
(1) that "many of the actions of the County involved legitimate concerns"[10];
(2) that "Omni too was responsible for some the delay in the process. . .[b]ecause Omni had elected on its own to submit a plan that was dependent on the development of Doves Overlook . . ."[11]; and
(3) at the time Omni went to settlement on Doves Landing "neither the preliminary plan for Doves Overlook, nor the preliminary plan for Doves Landing had been approved by the

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[10] A-12. The trial court continued that "some were in violation of the law; as the parties learned in the litigation that ensued as the owners tried to force the County not to impede the plan approval process." The evidence in this regard, however, related to the County's contention that a proposed three-mile extension of public water and sewer required a review under Virginia Code Ann. § 15.1-456. *See* A-37. While hindsight now shows that the County did not prevail on this position, there was no evidence that it was unreasonable or sanctionable. Indeed, both Omni and DLA recognized the legitimacy of the dispute by entering into consent decrees placing plan approval on hold while the issue was resolved through the appellate process. *See* A-37. The trial court found that the parties had so agreed. A-13.

[11] A-12.

County...; Omni still had no written or enforceable cost sharing agreements."[12]

On page 5 of the Petition, Omni intimates that the purchase of Doves Overlook was part of a County effort to arrest the proposed Doves Landing development. Omni fails, however, to point to evidence to support this claim sounding in conspiracy and tort. Indeed, this assertion contradicts Omni's contention at trial that there was no such conspiracy and the trial court's observation that this was not a tort case. JA 2025-27, 2047. In any event, there was no *evidence* linking the various disparate, facially-neutral events to a supposed effort to block development of Doves Landing. The only suggestion in this regard came from argument of Omni's counsel.

On page 4 of the Petition, Omni erroneously states that "the properties were targeted in the County's 'Stale Zoning Report'" (hereinafter, the "Report"). The trial court made no such factual finding and there was no evidence showing Doves Landing to have been singled out for adverse treatment. Doves Landing was one of a large number of undeveloped properties the Report indexed as having old zoning that had become inconsistent with the County Comprehensive Plan. JA 2245-47, 2332. When included in the 1987 revision of the Report, Doves Landing and Doves Overlook were among twenty-four properties added since the March 1987 version. JA 2332. The only testimony was that the Report was neither adopted nor implemented through the subdivision review process. JA 1210-11. In addition, the Report contained *no* recommendations as to Doves Overlook,

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12 A-13.

Doves Landing or *any* of the other numerous properties listed therein. The Report only outlined a number of alternatives that the Board of Supervisors might, but did not, consider. JA 2260-61.

Omni states, further, that a memorandum from the County Attorney contained a "plan of action to illegally stop [Doves Overlook and Doves Landing]." Pet. 4. That memorandum, however, contains no mention of the Doves Landing property and was issued in the context of the Virginia Code Ann. § 15.1-456 dispute discussed in the opinion below. A-37[13]. Far from being an illegal plan to stop Doves Overlook or Doves Landing, the memorandum only reflected agreement with the Zoning Administrator's conclusion that a Va. Code Ann. § 15.1-456 review would be needed for *Doves Overlook* and that public utilities could not be extended to *Doves Overlook* "for valid legal reasons." JA 2381. The County Attorney was even cautious to note that:

> Nor do I believe that refusal to process this plan will result in any liability under developing case law regarding regulatory takings. The property may yet be lawfully used at one acre density under the ordinance provisions cited above. Thus, valuable use remains in the land, and that precludes a taking.[14]

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13 253 Va. at 64, 481 S.E.2d at 462.

14 It is important to note that Omni did not complain below that it was deprived of the right to develop on public water and sewer once the Va. Code Ann. § 15.1-456 issue was resolved in January of 1990. *See* A-37 (253 Va. at 64, 481

JA 2381. While the former County Attorney's legal interpretation on the need for a Va. Code Ann. § 15.1-456 review ultimately did not prevail, it does not follow that it was part of a illegal plan to stop Doves Overlook and Doves Landing by any means possible. It was, rather, a legal and land use planning issue about which lawyers, planners and developers could, and did, legitimately disagree.

Omni also claims that the County's "Sewer in the Green" policy was part of a plan directed specifically at Doves Landing and Doves Overlook. Pet 3. The evidence showed, however, that water and sewer lines were not allowed in *any* of the areas planned for "agricultural", "resource management" or "rural residential" uses, and colored various shades of green on the Comprehensive Plan. JA 1321-22. This land use planning policy was of County-wide application. *Id.*

Omni also claims that the Chesapeake Bay Preservation Act[15] was partly responsible for a regulatory taking of Doves Landing. Pet 5. The evidence at trial established, however, that Doves Landing was not in any way

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S.E.2d at 462). It complained, rather, that it could not extend those facilities (and an access road) through Doves Overlook at a time of its choosing and share the cost with the owner of Doves Overlook. Again, it elected the Doves Overlook route over an upgraded Doves Lane but never entered into an agreement securing that route. *See* p. 4, herein.

[15] Va. Code Ann. § 10.1-2100, *et seq.*

impacted by this law. JA 1343-45, 1799. Therefore, the Chesapeake Bay Preservation Act was of no relevance at trial.

Omni asserts that County improperly required "an approved road bond in the preliminary plan stage rather than at the final plan stage." Pet. 5. However, the evidence at trial established, as a well-known and customary prerequisite for submission to the Prince William County Planning Commission, the requirement that a preliminary development plan show subdivision access to a state-maintained road. JA 1192-94, 1196-98, 1200-05. As stated above, Omni *chose* to make its planned development dependent upon Doves Overlook for that access instead of showing access through an upgraded Doves Lane. *See*, p.4, herein. DLA never submitted the requisite, bonded road plan for Doves Overlook that Omni needed to move its Doves Landing development plan forward to the Planning Commission. JA 1309. As found by the trial court, Omni had no legal means to compel DLA to do so. A-5.

The other adverse consequence to Omni of electing to make its development dependent upon Doves Overlook was that it had no choice but to *hope* that DLA would submit a final subdivision plan for Doves Overlook before November 27, 1990, in order that Doves Overlook would be vested and thus avoid compliance with the Commonwealth of Virginia's Chesapeake Bay Preservation Act regulations, as provided by the County's vesting guidelines. JA 2732. Unfortunately for Omni, DLA did not submit a final plan before that date, although its preliminary plan approval date (February 7, 1990) accorded it almost ten (10) months to do so. DLA did not even *seek* a County determination that it was vested from complying with the Chesapeake Bay Preservation Act until approximately six (6) months after that Act was effective. JA

1521. Worse for Omni, DLA did not pursue an appeal of the ensuing adverse vesting determination, electing instead to submit to regulation by filing the required "Preservation Area Site Assessment" (PASA) study in summer of 1991. JA 1521-22. The PASA was approved in December 1991 and DLA submitted its first final subdivision plan for Doves Overlook in January, 1992. JA 1510-11, 1839. Even when submitted, that plan *did not* show the bonded road access Omni needed to move its preliminary subdivision plan for Doves Landing forward. JA 1510-11, 1839, 2937.

Omni also misrepresents that "Supervisor Becker, in fact, testified that depriving Omni of the ability to use its property as planned, at no apparent additional cost to the County, was one of the known and understood benefits to the County of the settlement of the DLA lawsuit." Pet. 6. Omni refers to a surreal episode in which the trial court allowed Supervisor Becker to be questioned adversely, and over exception, as to whether the motives of members of the Board of County Supervisors in settling a previous lawsuit were consistent with a letter from DLA's counsel proposing settlement.[16] The trial court allowed this questioning *only* for the purpose of showing the County's *knowledge* at the time of

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[16] This settlement proposal was written on behalf of DLA (not the County) by the very lawyer that questioned Becker (also Omni's counsel in this case) and *more than a year before the settlement*. JA 1415-23. Under Virginia law, moreover, the motives of members of a county board of supervisors in voting for or against an official act (such as the settlement of a lawsuit) are not relevant and may not be inquired into. *See* Blankenship v. City of Richmond, 188 Va. 97, 49 S.E.2d 321 (1948).

settlement. JA 1419. Supervisor Becker's testimony, moreover, was devoid of any reference to Omni or a goal of depriving anyone of "the ability to use its property as planned." More strange is that Supervisor Becker testified repeatedly that the goal of buying Doves Overlook was to settle a lawsuit and that he did not even know the route Omni planned to take with water and sewer lines. JA 1415-17. In response to the trial court's inquiry, he specifically denied that the County purchased Doves Overlook for the purpose of blocking development on Doves Landing. JA 1404. Thus the evidence established *only* that Doves Overlook was purchased as part of a settlement of a separate inverse condemnation lawsuit that was based, in part, on the impact of the Chesapeake Bay Preservation Act. (Va. Code Ann. § 10.1-2100-2116).[17] The Supreme Court of Virginia recognized this in its opinion. A-38 (253 Va. at 64, 481 S.E.2d at 462).

Omni's claim that the County deprived it of joint R-10 development by purchasing Doves Overlook is belied by Omni's admissions that it did not even *ask* the County to agree to arrangements for such development after the County purchased Doves Overlook. JA 1504 A-C, 1505-08, 2693-97. It is also contradicted by Omni's admission at trial that it did not even *ask* the County to grant it easements for the water, sewer and road easements across the Doves Overlook property. *Id.* Admission 12. More important, neither the trial court nor Omni cited law that imposed on the County the

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[17] Again, the evidence at trial established that, unlike Doves Overlook, Doves Landing was not impacted by the Chesapeake Bay Preservation Act. *See* p. 9, herein.

Constitutional obligation to use its legally-acquired property[18] in a way that most benefited Omni. Hence the irrelevance of the trial court's finding that "since its purchase of Doves Overlook, the County has taken no action whatsoever to use or develop Doves Overlook in any manner including as an R-10 Subdivision. . .or to build the planned roads, water and/or sewer systems." Pet. 6, A-14.

For the reasons stated above, Omni's statement of the case is not accurate. This Court should adopt the statement of case and facts set forth in the opinion below instead. It should also evaluate Omni's specific factual claims in light of the corrections set forth herein.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO CONSIDER THE QUESTIONS PRESENTED BY OMNI'S PETITION

A. SO-CALLED "REGULATORY PARTIAL TAKING" THEORY WAS NEITHER RAISED NOR ADDRESSED BELOW

This Court wisely refuses to review judgments rendered by a state court of last resort unless a federal question has been raised or decided in the state court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing

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[18] Neither Omni nor the trial court questioned the validity of the County's purchase of Doves Overlook pursuant to Va. Code Ann. § 15.1-262. A-24, A-26 through A-27.

judgments of state courts under 28 U.S.C. § 1257, the Court will refuse to consider claims that were not raised or addressed below) *See also Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (because petitioner failed to argue equal protection in state court, question was not before this Court).

In its Petition, Omni suggests jurisdiction by this Court by continuing to mislabel both its claim and the trial court's ruling as "regulatory partial taking."[19] As noted by the Supreme Court Virginia,[20] however, Omni only argued that it suffered a taking of a denominator consisting of the *entire fee* of Doves Landing. Omni asserted that the regulatory taking of its *fee* could be determined by either: (1) the categorical

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[19] This Court has repeatedly rejected that there is such a thing as a partial regulatory taking. To the extent this Court has discussed the issue, it has mused about denominators consisting of something less than the fee. *See Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016 n. 7. These musings, however, directly conflict with the long-standing precedent of this Court, *reaffirmed subsequent to Lucas*, that the denominator is the parcel as a whole (*e.g.* all sticks in the bundle of rights) *See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, (1993) *citing Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) and *Keystone Bituminous Coal Assn. v. DeBeneditis*, 480 U.S. 470 (1987). Therefore, there is no important federal question as to whether there is such a thing as a "partial regulatory taking". This Court has already decided there is not. *See* p. 27, herein.

[20] A-50 & n. 4; (253 Va. at 71& n. 4; 481 S.E.2d at 467 & n. 4).

method first announced by this Court in the *Lucas v. South Carolina Coastal Council*[21] or (2) by the three-part, *ad hoc method* endorsed by this Court before and after *Lucas.*[22] Omni's statement of the case here also contradicts Omni's current claim that a partial regulatory taking theory was at issue. It accurately characterizes the trial court's ruling as a finding that County regulation "went too far by denying Omni all economic and viable use of *its property*. . . ." Pet. 3. *See also* A-3. (emphasis added). The failure of both Omni and the lower courts to address Omni's regulatory taking claim based on any less of a denominator than the entire fee of Doves Landing places this case outside this Court's purview. *See Yee v. City of Escondido,* 503 U.S. at 523-33. Omni cannot circumvent this jurisdictional defect by its continued mislabeling, as a "regulatory partial taking", an alleged loss of value in the entire bundle of rights. To the extent this Court has discussed the issue in footnote dictum and dissenting opinions it has only been as a total taking of something less than the fee. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016 n. 7; *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 138-153 (1978) (Rehnquist, J., *dissenting*); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 506-21 (1986) (Rehnquist, C. J., *dissenting*).

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[21] 505 U.S. 1000 (1992).

[22] Both Omni and the trial court occasionally confused the term "partial taking" with Omni's alternative argument that it suffered a taking of *all* economically-viable uses in the *whole* of Doves Landing, but as measured by the pre-*Lucas,* ad hoc analysis (as opposed to the categorical test first announced by this Court in *Lucas.*) *See* A-25. Omni continues to exhibit that confusion here. *See* Pet. 11-12.

B. THERE IS NO CASE OR CONTROVERSY INVOLVING THE CONCEPT OF A SO-CALLED "PARTIAL REGULATORY TAKING"

A basic requirement for review in this Court is that there be an actual case and controversy involving the issues presented for review. *See e.g. Golden v. Zwickler*, 394 U.S. 103 (1969). This Court does not render purely advisory decisions; a petitioner must have an immediate, legal interest in the outcome of the decision. *Id.* In this case, Omni would not be any more entitled to compensation if this Court were to reverse its prior rulings and declare that there is such a thing as a "regulatory partial taking." This is because Omni failed to prove that County regulation deprived it of *even one* land use interest in Doves Landing.

Omni claimed that it lost the right "to develop Doves Landing as an R-10 development in conjunction with Doves Overlook for water, sewer and road access." Pet. 4. Both courts below, however, found that this right was never a stick in the "bundle of rights" of Doves Landing in the first place. A-5 through A-6; A-49 (253 Va. at 71, 481 S.E.2d at 467). Omni had no more than a "unilateral expectation or abstract need" to this preferred method of development. *See Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 165 (1980); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994). Under the proper analysis set down by this Court, the Constitution does not require compensation if, as here, "the proscribed use interests were not part of [the owner's] title to begin with." *Lucas* 505 U.S. at 1027. *See also M & J Coal v. United States*, 47 F.3d 1148 (Fed. Cir. 1995); *Hage v. United States*, 35 Fed.Cl. 147 (1996). Omni would not have been entitled to Fifth Amendment

compensation for the loss of this non-existent land use interest, even if Omni *had* asserted it as the entire denominator. Omni, therefore, has no immediate, legal interest in any declaration that there is such a thing as a "regulatory partial taking" and its first and second Questions Presented should be dismissed because they ask this Court to render an advisory decision.

C. OMNI'S THIRD QUESTION PRESENTED DOES NOT STATE A BASIS UPON WHICH THIS COURT SHOULD EXERCISE DISCRETION TO GRANT A WRIT OF CERTIORARI

Pursuant to Rule 10, this Court does not normally grant a writ of certiorari when the asserted error consists of the misapplication of a properly stated rule of law. Omni's third Question Presented falls squarely into this camp. *See* Pet. i, Question Presented # 3. In the corresponding argument, Omni agrees with the Supreme Court of Virginia's summation of the reasonable investment-backed expectation rule: that property owners must "demonstrate that they bought their property in reliance upon a state of affairs that *did not include the challenged regulatory regime*." Pet. 18. (emphasis in original) *Compare* A-43 through A-44 (253 Va. at 68, 481 S.E.2d at 465). Omni takes issue only with the Virginia court's *application* of that rule to conclude that Omni did not possess such expectations.

The Supreme Court of Virginia applied the rule to conclude that the requirement for road and utility access was part of the "state of affairs" upon which Omni relied when it purchased Doves Landing." A-44 through A-46 (253 Va. at 69-70, 481 S.E.2d at 465-66). Omni argues that the Supreme Court of Virginia should have applied the rule differently to

conclude that the County's purchase of Doves Overlook was not "foreseeable" because it was allegedly "illegal and meritless."[23] Pet. 18-20. Omni's argument, being one of mere misapplication of a properly-stated rule, does not merit the exercise of this Court's discretionary jurisdiction pursuant to Rule 10. Alternatively, it is only an argument that the Supreme Court of Virginia's decision is erroneous, which is also not a basis upon which this Court grants a writ of certiorari. *Ross v. Moffit*, 417 U.S. 600, 616-17 (1974).

II.

THE SUPREME COURT OF VIRGINIA'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR THOSE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Rule 10 states conflict with the decision of this Court or a decision of a United States court of appeals as a basis upon which a petition for certiorari may be granted. The

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[23] Omni does not address the Supreme Court of Virginia's finding that the purchase, whether "foreseeable" or not, did not impose the risk that Omni might not secure the needed access, "did not change the requirements for R-10 development, and did not interfere with or frustrate any enforceable arrangement or right Omni had regarding road or utility access." A-46, (253 Va. at 70, 481 S.E.2d at 466). Omni also does not address the failure of it to challenge, and the Courts below to address, the validity of the purchase of the Doves Overlook property pursuant to Va. Code Ann. § 15.1-262 (*See,* footnote 18) and the resulting jurisdictional defect to consideration of such a claim now. *See* pp. 13-15, herein.

failure of Omni to prove that County regulation deprived it of *even one* land use interest in the fee of Doves Landing reconciles the Supreme Court of Virginia's opinion with those upon which Omni attempts to base its conflict claim. Both this Court and the United States Court of Appeals for the Federal Circuit (the "Federal Circuit") have stressed that a proscribed land use interest must be inherent in the title itself before it can be said to have been taken by regulation. Thus, the Supreme Court of Virginia's decision (denying Omni compensation for deprivation of a non-existent land use) is *not* in conflict with this Court of the United States Court of Appeals for the Federal Circuit.

A. OMNI'S PETITION DOES NOT STATE A CONFLICT BETWEEN THE OPINION BELOW AND THE DECISIONS OF THIS COURT.

Omni asserts that the Supreme Court of Virginia 's decision is in conflict with this Court's decisions in *Nollan v. California Coastal Commission*[24] and *Agins v. City of Tiburon.*[25] Omni's contention is without merit. First, it ignores crucial analytical distinctions between *Nollan* and *Agins* and the instant decision. Second, it obfuscates a critical and basic distinction: that the landowners in *Agins* and *Nollan* actually possessed the proscribed land use interest as a stick in their respective bundles of rights. Unlike Omni, therefore, they were able to benefit from those uses but for the challenged regulation.

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[24] 483 U.S. 825 (1987).

[25] 447 U.S. 255 (1979).

1. *AGINS* AND *NOLLAN* ARE ANALYTICALLY DISTINCT FROM THE DECISION BELOW

On page 8 of its Petition, Omni focuses on the Supreme Court of Virginia's statement that it was:

> unnecessary to consider the *third criterion*, the character of the County's action, because regardless of the legality or merit of the County's action, Omni did not establish a regulatory taking of Omni's property under the Fifth Amendment.

A-47 through A-48[26] (253 Va. at 71, 481 S.E.2d at 466-67) (emphasis added). Omni omits the words "third criterion" from its quotation of this passage. *See* Pet 8. In so doing, Omni also omits the context in which the Virginia high court spoke. The Supreme Court of Virginia was applying the "traditional three-part test"[27] for determining a regulatory

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[26] Omni incorrectly cites the Appendix at A-46. This quotation actually appears at the bottom A-47 to the top of A-48.

[27] A-41. The Supreme Court of Virginia referred to the traditional, ad hoc analysis, elaborated on by this Court in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). Although sometimes referred to as a "test", both the Supreme Court of Virginia and the trial court correctly noted that there is no requirement that each prong of this analysis be applied in every case. A-26; A-47, 253 Va. at 71, 481 S.E.2d at 466, *citing Lucas,* 505 U.S. at 1071; Hodel v. Irving, 481 U.S. 704 (1987). Thus, precedent of this Court did not require the Supreme Court of Virginia to apply the third

taking. This is a test *which neither Agins nor Nollan applied.* Furthermore, it is an analysis that is distinct from the categorical, "legitimate state interest" analysis employed by this Court in *Agins* and *Nollan.*[28] Therefore, *Agins* and *Nollan* cannot serve as a basis for conflict with the Supreme Court of Virginia's decision not to address the "character prong" of the ad-hoc regulatory taking analysis.

2. *AGINS* AND *NOLLAN* CONCERNED LANDOWNERS WHO POSSESSED THE LAND USE INTEREST AT ISSUE AS A STICK IN THEIR BUNDLES OF RIGHTS

Agins and *Nollan* are, furthermore, easily distinguished from the instant case. Both involved cases where government regulation actually deprived the landowners of a land use interest existing within the fee of their properties. In *Agins*, the owners were deprived of the right they would otherwise have to develop a higher density than what the government regulation permitted. Unlike Omni,

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prong (character of the governmental regulation) after finding that Omni's claim did not satisfy the first two prongs. *See Hodel* 481 U.S. at 714.

[28] *Agins* and *Nollan* form the second sort of categorical regulatory taking to which this Court referred in *Lucas*: "where the land use regulation 'does not substantially advance legitimate state interests." *Lucas*, 505 U.S. at 1016, *citing Agins*, 447 U.S. at 260. Omni did not argue, and the lower courts did not address, this second categorical regulatory taking theory. Therefore, this Court would not have jurisdiction to entertain that theory now. *See* p. 13, herein.

the Agins' realization of that higher density was not dependent upon the good graces of a neighbor.

In *Nollan*, the landowners were required to grant to the public an easement through their beachfront property as a condition to building a house on the property. Omni, on the other hand, was not deprived of any property right. As noted by the Supreme Court of Virginia when discussing "damage" under the Constitution of Virginia:

> Omni has not lost the right to develop its property. The R-10 density classification had not been altered . . . Omni had not acquired the rights necessary to realize its preferred method of development either as a matter of contract or easement.

A-49 (253 Va. at 72, 481 S.E.2d at 467).

It was only because government regulation actually deprived the landowners in *Agins* and *Nollan* of property under the Fifth Amendment that this Court went on examine whether the legitimate state interest was furthered by the taking. This is because governmental conduct, whatever its nature, cannot violate the Just Compensation Clause if it takes no property. Omni's failure to prove that governmental regulation deprived it of property renders *Agins* and *Nollan* inapposite to the decision below.

3. THE ANALYSIS BELOW IS CONSISTENT WITH THIS COURT'S RULINGS DISMISSING TAKINGS CLAIMS WHERE THE LANDOWNER DID NOT POSSESS THE PROPERTY RIGHT ASSERTED

The Supreme Court of Virginia's analysis, furthermore, is consistent with the decisions of this Court dismissing takings claims because the challenged governmental action did not deprive the claimant of property.[29] *See e.g. U.S. v. Willow River Power Co.*, 324 U.S. 499 (1945). In *Willow River*, the claimant power company claimed a taking based on the lowering of the water level of the St. Croix River and the consequent loss of its power head. This Court, like Supreme Court of Virginia in the instant case, had no occasion to examine the character of the governmental conduct. This Court only reached the issue of whether the power company had a property right to the high-water level in the first place:

> We hold that claimant's interest or advantage in the high-water level of the St. Croix River as a run-off for tail waters to maintain its power head is not a right protected by law and that the award below based exclusively on loss in value thereof must be reversed.

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[29] This Court has long held that compensable property rights are not created by federal courts, but by existing rules and understandings stemming from an independent source such as state law. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

See also United States v. Chandler-Dubar Water Power Co., 229 U.S. 53 (1913) (no property interest can exist in navigable waters). This Court reaffirmed the definitive nature of the property right question in *Penn Central, supra.*, from which the so-called "ad hoc" analysis sprung. *See Penn Central*, 438 U.S. at 124-125, *citing Willow River* and *Chandler-Dubar*. More recently, in the *Lucas* opinion, this Court reaffirmed that no compensation is due under the Fifth Amendment, even where all economically beneficial use is destroyed by regulation, "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027.

Consistent with these precedents, the Supreme Court of Virginia properly focused on the definitive issue of what rights Omni possessed in its fee:

> Omni's gamble here went beyond merely securing road and utility access. Omni's proposed development depended on such access coming through Doves Overlook. There was no assurance that such access would be available. *Omni's ownership of Doves Landing did not carry with it any right or assurance that Omni could utilize access through Doves Overlook. There were no easements or contracts giving Omni road or utility access through or with Doves Overlook.*

A-44 through A-46 (253 Va. at 69, 481 S.E.2d at 465). (emphasis added). Under the precedents set forth above, this conclusion rendered it unnecessary to address the character of the County's regulatory conduct. Therefore, Omni's claim

that the opinion below is inconsistent with the rulings of this Court is without merit. Indeed, the Virginia high court's opinion falls squarely within this Court's precedents holding that the governmental purchase of a parcel does not amount to a taking of abutting property even though it might affect the beneficial use to which that abutting property can be put. *See Reichelderfer v. Quinn*, 287 U.S. 315, 319 (1932).

B. THE SUPREME COURT OF VIRGINIA'S OPINION DOES NOT CONFLICT WITH DECISIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

The definitive property issue also reconciles the opinion below with the cases cited by Omni from the Federal Circuit Court. In both *Loveladies Harbor, Inc. v. U.S.*[30] and *Florida Rock Industries, Inc. v. U.S.*[31] the Federal Circuit addressed claims by owners who actually possessed, within their fees, the common law right to mine limestone but for denial of the governmental permit. In neither case was exploitation of the right dependent upon beneficence of an adjoining property owner. The "owners' basis or investment"[32] in the properties was in pursuit of a right existing in their respective titles by virtue of common law Indeed, Florida Rock Industries had already commenced mining operations on its property when the U.S. government

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[30] 28 F.3d 1171 (1994).

[31] 18 F.3d 1560 (1994).

[32] *See* Pet 13, citing *Florida Rock*, 18 F.3d at 1567.

issued a cease and desist order. *See Florida Rock*, 18 F.3d at 1562. In addressing Chief Judge Nie's dissenting opinion, the majority was careful to note that it was this common law right, and not just value, that was being taken. *See id* 18 F.3d at 1572.

Conversely, Omni's investment or basis in its preferred method of developing Doves Landing was based on nothing more than "a risk of development".[33] A-44 through A-45 (253 Va. at 69, 481 S.E.2d at 465). The Supreme Court of Virginia actually *followed* the Federal Circuit's holdings that compensation is not due for such a diminution in value because:

> One who buys with knowledge of a restraint must assume the risk of economic loss. . . . A party may not undertake a calculated business risk and then seek reimbursement from the Government when the party's gamble does not result in its favor.

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[33] A-44 through A-45 (253 Va. at 69, 481 S.E.2d at 465). Not only was Omni's basis or investment unsecured by a property right it owned, but the evidence failed to show that Omni spent *any* of that basis *even attempting* to secure the access upon which its preferred method of development was premised. The Supreme Court of Virginia expressly recognized this oddity in its decision. A-45 (253 Va. at 69-70, 481 S.E.2d at 465). As stated above, admissions at trial also established that Omni never even *asked* for these rights from the time the County became the owner of Doves Overlook. *See* p. 12, *supra.*

Id., citing Loveladies, 28 F.3d at 1177, *Crepple v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994); *Altas Enters. Ltd. Partnership v. United States*, 32 Fed. Cl. 704, 708 (1995). (internal citations omitted).

The Federal Circuit has, moreover, been careful to endorse the definitive property right analysis followed by this Court and the Supreme Court of Virginia below. In *M & J Coal v. United States*,[34] a mining company had acquired the right to mine coal through various severance deeds. The U.S. Department of Interior issued an order that the company cease certain dangerous mining practices. M & J alleged a taking. The Federal Circuit stressed that:

> precedent indicates a "two-tiered" approach in analyzing a takings claim involving governmental action that result in land use restriction. First a court should inquire into the nature of the land owner's estate to determine whether the use interest was part of the owner's title to begin with, *i.e.* whether the land use interest was a 'stick in the bundle of property rights acquired by the owner. *Lucas*, U.S. at ___, 112 S. Ct. at 2899. Second, if the claimant can establish the existence of such an interest, the court must determine whether the government action at issue constituted a compensable taking of that "stick".

47 F.3d at 1153-54. Employing this analysis, the Federal Circuit held that the coal company's "acquisition of mining rights by deed did not give it the right to mine in such a way to endanger the public health and safety." *Id.* Significantly, this finding rendered it unnecessary for the court to proceed with

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[34] 47 F.3d 1148 (Fed Cir. 1995).

the "second tier" in the analysis, *viz*, whether governmental action took such a right.

The Federal Circuit has complied with this two-tier analysis since *M & J*. In *Avenal v. United States*,[35] for example, the Federal Circuit first addressed the question of whether Louisiana law recognized, as property, leases for water bottom lands for oyster propagation *before* moving on to decide whether that property had been taken by conduct "that reduced the value of Plaintiff's property well beyond the level of 'mere' diminution". 100 F.3d at 937 *citing Florida Rock* 18 F. 3d at 1570. The Federal Circuit was obliged to find that:

> [t]he question, then is not whether the Plaintiffs had a constitutionally protected property interest that was taken by the Government. The leasehold estates owned by the Plaintiffs entitled them to use the beds of the Basin for the cultivation of oysters. *Id.* 936-37.

The Federal Circuit's continued adherence to the "two-tier approach" set down by this Court removes any conflict with the opinion below denying Omni compensation for the loss of a property right it never possessed.

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[35] 100 F.3d 933 (Fed. Cir. 1996).

III.

THE PETITION DOES NOT RAISE AN IMPORTANT FEDERAL QUESTION

As stated at footnote 19, this Court has consistently rejected the notion that there is such a thing as a " regulatory partial taking". *See Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978); *Concrete Pipe and Products of California Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 602 (1993). Therefore, Omni's Petition does not raise an important undecided federal question. For this additional reason, the Petition does not raise a basis for the exercise of this Court's discretionary jurisdiction under Rule 10.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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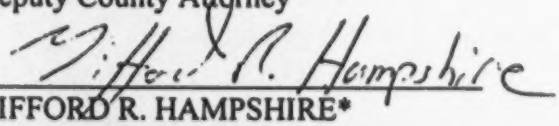

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Record No. 96-1878

In The
SUPREME COURT OF THE UNITED STATES

October Term 1996

OMNI HOMES, INC.
Petitioner,

vs.

BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA
Respondent.

CERTIFICATE OF SERVICE

I, Gifford R. Hampshire, a member of the Bar of this court, hereby certify that on this 26th day of June, 1997, three copies of this Brief in opposition in the above-entitled case were mailed, first class mail to: to Mark A. Moorstein, Esq. and James A. Yergin, Esq.; Mark A. Moorstein, P.C. 10500 Battleview Parkway, Suite 210, Manassas, Virginia 22110, Counsel for Petitioner. (703) 361-6500. All parties required to be served have been served.

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Supreme Court, U.S.
FILED
JUL 7 1997
OFFICE OF THE CLERK

No. 96-1878

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

OMNI HOMES, INC.,

Petitioner,

v.

BOARD OF SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA,

Respondent.

ON APPEAL FROM
THE SUPREME COURT OF VIRGINIA

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. *The County's Statement Of The Case Is Incorrect*

The County's Statement Of The Case mischaracterizes the issues that were before the trial court, the trial court's findings and decision as well as the basis for those findings and decision. It slants the County's conduct in such a way as to render the County's obvious wrongs spuriously acceptable.

A review of the trial court's detailed and thorough analysis and decision (Appendix, pp. A-2 to A-33) shows that, notwithstanding the County's many attempts at framing the wrong issues, the County engaged in conduct that was both designed and executed in a way to illegally and unconstitutionally interfere with Omni's right to use Omni's own property. (Appendix, page A-11 to A-14).

The County's attempt to characterize its conduct as an unrelated set of innocent governmental actions that may have coincidentally and unintentionally affected Omni's planned use of its property is neither supported by the evidence nor the findings of fact made by the trial court.

Even the Supreme Court of Virginia limited its decision solely to the trial court's supposed error in interpreting the law. (Appendix, page A-39). It did not reverse any of the trial court's findings of fact. Those findings of fact should be used as the basis for ruling on Omni's Petition and not the County's assertions that contradict those findings.

II. *The Property Right At Issue Is Omni's Right To Use Its Property Free From Government Interference That Does Not Advance A Substantial State Interest.*

In its Brief In Opposition, the County sets up the false premise that the property right at issue is Omni's right to use the neighboring property for road and utility access. It is the same mistake made by the Supreme Court of Virginia when it ignored the finding of the trial court that the property right at issue is "the right of Omni to use its property, and to do so at a density permitted under R-10 zone." (Appendix, page A-31).

The trial court's finding is in accord with this Court's description of property rights as "the rights 'to possess, use and dispose of [a thing].'" Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 102 S.Ct. 3164, 73 L. Ed. 2d 868 (1982)(quoting United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 89 L.Ed. 311 (1945)); see also Buchanan v. Warley, 245 U.S. 60, 74, 38 S.Ct. 16, 62 L. Ed. 149 (1917) ("Property is more than the mere thing . . . . It includes the right to acquire, use, and dispose of it.")

> **The idea of property consists in an established expectation; in the persuasion of being able to draw such or such advantage from the thing possessed, according to the nature of the case. Now this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law that I am**

> **able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest. . . . As regards property, security consists in receiving no check, no shock, no derangement to the expectation, founded on the laws, of enjoying such and such a portion of good. The legislator owes the greatest respect to this expectation which he has himself produced. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil.**

Bentham, Theory Of Legislation, Principles Of The Civil Code, Part I, 111-113, Dumont, ed. Hildreth, Trans. (1864).

Omni has never argued that it had a property right in the neighboring property nor did the trial court find that the existence of such a right was necessary for a taking of Omni's property. The crux of this case is that the County decided to block Omni's lawful use of Omni's property for reasons that did not substantially advance legitimate governmental interests. The purchase of the neighboring property was just the final act in accomplishing that improper and unconstitutional goal. It was not the innocent purchase of neighboring property for the good of the whole community (e.g. for the construction of a firehouse). It was the culmination of a systematic effort to improperly interfere with Omni's lawful right to use and develop its own property.

As cited by the County in its Brief In Opposition, this Court has held that the proper antecedent inquiry in this type of case is a determination of the nature of the owner's estate to see if the proscribed use interests were

part of his title to begin with. Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 120 L.Ed.2d 798, 820 (1992). It is a question of "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." Lucas, 120 L.Ed. 2d at 814 (fn 7).

In Virginia, a landowner's ability to *use and control* his property is a fundamental and constitutionally recognized and protected property right. See, Bartz v. Board of Supervisors of Fairfax County, 237 Va. 669, 672, 379 S.E. 2d 356, 358 (1989); see also, Richmond, Fredericksburg & Potomac Railroad Company v. Metropolitan Washington Airports Authority, 251 Va. 201, 468 S.E.2d 90, 97 (1996) (government action to prevent development constitutes inverse condemnation).

The trial court correctly made the determination that the property rights at issue were Omni's control over its own land and its right to use and develop its own property as planned under the existing R-10 zoning. (Appendix, page A-31). The trial court found that this was indeed a protected property right based upon Omni's reasonable investment-backed expectations that the County would not interfere except to advance substantial state interests. (Appendix, page A-28).

The fundamental flaws in the decision of the Supreme Court of Virginia (which the County now seeks to perpetuate) were the Supreme Court of Virginia's refusal to address the correct property right at issue as well as the reasons for the County's actions. It is analogous to a finding in a murder case that, even though it was proved beyond a reasonable doubt that the criminal defendant shot the victim in cold blood, he could not be guilty of murder because he had a permit to own

the murder weapon. In Omni's case the County had the statutory power to purchase the neighboring property and deny Omni road and utility access but it was a violation of Omni's property rights for the County to do so for reasons that did not advance substantial state interests.

Omni had the clear right to develop its property free from the interference of the County except for reasons that advanced substantial state interests. That is the property right that is at issue, not Omni's right in the neighboring property and it is why the character of the County's actions cannot be ignored.

III. *The Important Federal Question Of Whether There May Be A Partial Compensable Regulatory Taking Of Private Property Under The Fifth Amendment To The United States Constitution Was Raised And Addressed Below.*

The County's assertion that the issue of a partial regulatory taking was not raised or addressed below is absolutely false. The issue was extensively briefed both at trial and in the appeal to the Supreme Court of Virginia. The trial court clearly applied the *ad hoc* three part partial regulatory takings test. (Appendix, page A-25). Even the Supreme Court of Virginia utilized the test (albeit incorrectly, by not addressing the critical determination of the character of the governmental actions). (Appendix, page A-40 to A-41).

As the Supreme Court of Virginia stated:

> **Nothing in Lucas, however, indicated an intent to limit compensable takings under the Fifth Amendment to [categorical**

> takings]. Courts considering the issue since Lucas have continued to resolve Fifth Amendment claims involving less than a categorical taking of property by utilizing the traditional three-part test.

Omni Homes, Inc., (Appendix, page A-41).

It is therefore baffling as to how the County can now assert that the issue was never raised or addressed below. The County's incorrect assertion can only be attributed to the County's confusion as to what constitutes a partial regulatory take. It is, of course, something less than a categorical take and it was that type of take that was addressed in the decision of the Supreme Court of Virginia in this case.

IV. *The County's Assertion That This Court Has Already Decided That There Can Be No Partial Regulatory Takings Is Incorrect.*

In its Brief In Opposition, the County makes the incorrect assertion that this Court has consistently held that there can be no partial regulatory taking under the Fifth Amendment. In doing so, the County dismisses the discussion of the issue in Lucas as mere "musings."

The County's assertion also ignores the opinions of the Court of Appeals for the Federal Circuit. That court has held, post-Lucas, that there can be partial regulatory takings under the Fifth Amendment. Loveladies Harbor, Inc. v. U.S., 28 F.3d 1171, 1179-80 (Fed. Cir. 1994).

As set forth in Omni's Petition, the Court of Appeals for the Federal Circuit has correctly summarized the status of the law on this issue as follows:

> **The question remains, does a partial deprivation resulting from a regulatory imposition, that is, a situation in which a regulation deprives the owner of a substantial part but not all of the economic use or value of the property, constitute a partial taking, and is it compensable as such? This question has been much debated in the literature since the Supreme Court's decision announcing that as a general proposition regulatory takings are compensable; the Court's decisions to date have not provided an answer.**

Florida Rock Industries, Inc. v. U.S., 18 F.3d 1560, 1568 (1994).

Even in its decision in this case, the Supreme Court of Virginia recognized that:

> **Courts considering the issue since Lucas have continued to resolve Fifth Amendment claims involving less than a categorical taking of property by utilizing the traditional three-part test. See e.g., Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 643-47 (1993); Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., 65 F.3d 1113, 1123 (4th Cir. 1995); Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994); Loveladies Harbor, Inc. v. U.S., 28 F.3d 1171, 1179 (Fed. Cir. 1994).**

Omni Homes, Inc., (Appendix, page A-40).

Given the status of the law on this issue, this case offers this Court the opportunity to clarify and resolve the issue of partial regulatory takes under the Fifth Amendment.

CONCLUSION

The County's Statement Of The Case mischaracterizes the issues that were before the trial court, the trial court's findings and decision as well as the basis for those findings and decision. The trial court's findings of fact should be used as the basis for ruling on Omni's Petition and not the County's incorrect and contradictory assertions.

Omni had the clear right to develop its property free from the interference of the County except for reasons that advanced substantial state interests. That is the property right that is at issue, not Omni's right in the neighboring property, and it is why the character of the County's actions cannot be ignored.

The County's assertion that the issue of a partial regulatory taking was not raised or addressed below is absolutely false.

The County's assertion that this Court has already decided that there can be no partial regulatory takings under the Fifth Amendment is incorrect and this case offers this Court the opportunity to clarify and resolve that issue.

Respectfully
Submitted,

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